RECORD
AND
BRIEFS.

17-204

No. 17-___

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) and its progeny hold that the damages remedy in antitrust disputes belongs only to the immediate victims of the anticompetitive conduct ("direct purchasers"), and not to downstream parties claiming "pass-through" damages ("indirect purchasers"). Electronic marketplaces such as Apple's App Store present a new wrinkle on this doctrine, because the marketplace sponsor (*e.g.*, Apple) interacts with and delivers goods "directly" to consumers, but as an agent on behalf of third party sellers.

The district court dismissed this action under *Illinois Brick*, holding that consumer plaintiffs alleging monopolization of distribution services Apple provides to app developers were necessarily seeking pass-through damages. The Ninth Circuit reversed, holding—in an acknowledged split with the Eighth Circuit—that consumers can sue whoever delivers goods to them, even if they seek pass-through damages.

The question presented is:

> Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Apple Inc. is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

Respondents are consumer plaintiffs Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell, all of whom purchased an iPhone and purchased an iPhone software application during the alleged class period. Respondents purport to represent a class of similarly situated persons in the United States who purchased an iPhone software application from December 29, 2007 to the present.

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OPINION BELOW

The decision below is reported at 846 F.3d 313 (9th Cir. 2017) Pet. App. 1a-22a. The order denying rehearing *en banc* is unpublished. *Id.* at 38a-39a. The district court's decision dismissing the second amended consolidated class action complaint is unpublished. *Id.* at 23a-37a.

JURISDICTION

The court below entered judgment on January 12, 2017 (Pet. App. 1a), and denied a timely rehearing petition on May 4, 2017 (*id.* at 39a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any "person . . . [to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

This case is about petitioner Apple Inc.'s "App Store," an electronic marketplace through which third-party software developers can sell software applications (called "apps") for the iPhone directly to consumers, in exchange for certain commissions paid to Apple. A putative class of consumers claims that Apple illegally monopolized the distribution of iPhone apps, and that the commissions charged to app developers inflate the prices consumers ultimately pay for apps. The threshold issue is who may seek damages based on allegedly anticompetitive conduct by Apple that allows it to charge excessive commissions on apps distribution: the app developers, the plaintiff consumers, or both?

This is a critical question for antitrust law in the era of electronic commerce. The leading case addressing this issue was *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), which held almost two decades ago that consumers could not seek damages based on alleged monopolization of ticketing distribution services, even if this resulted in higher ticketing service fees that consumers paid directly to Ticketmaster. The Eighth Circuit correctly recognized that under this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its predecessor, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), any damages claim belonged to the concert venues that were the direct victims of the alleged monopolization by Ticketmaster, not to consumers who had patronized Ticketmaster's electronic marketplace. In an invitation brief filed with this Court, the United States agreed

that consumer damages claims were barred by *Illinois Brick*.[1]

The Ninth Circuit has now thrown that settled law into disarray, in an opinion that expressly sides with the *dissent* in the *Campos* case and declares that consumers can always sue whichever party performs the marketplace "function" of a "distributor" and *delivers* goods to them. Since Apple delivers apps (electronically) to consumers, the Ninth Circuit held that consumers can sue Apple—regardless of whether Apple has actually sold anything of its own to consumers, and regardless of whether the consumers are complaining about a charge imposed not on them in the first instance, but (as is undisputed) on third-party developers instead.

The Ninth Circuit's brand-new "distributor function" rule is the ultimate elevation of form over substance, and boldly indifferent to this Court's precedent and underlying objectives. In *Illinois Brick* and *Hanover Shoe* this Court recognized that because alleged overcharges often get "passed through" a distribution chain in highly uncertain ways, attempts to determine who actually bears the burden of the overcharge and in what proportion would greatly increase the cost, and decrease the effectiveness, of antitrust litigation. The Court chose to eliminate that problem by permitting one set of plaintiffs—the first parties to bear an alleged overcharge—to recover the *entire* overcharge, and disallowing virtually all

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[1] *See* Brief for the United States and the Federal Trade Commission as Amicus Curiae, *Campos v. Ticketmaster Corp.*, 525 U.S. 1102 (1999) (No. 98-127), https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0127.ami.pet.inv.pdf ("*Campos* U.S. & FTC Br.").

damages suits by indirect victims. The guiding principles of the *Illinois Brick* doctrine are thus (a) avoiding the "famously difficult" determination of "[p]recisely what part of the overcharge will be borne by the direct purchaser, and what [portion of the overcharge] will be borne by the indirect purchaser," *Campos*, 140 F.3d at 1170, and (b) eliminating the threat of double recovery that would be posed if both direct and indirect purchasers could sue, *see Illinois Brick*, 431 U.S. at 730-31.

Yet identifying and avoiding pass-through dynamics plays no role in the Ninth Circuit's "distributor function" rule, and the Ninth Circuit expressly declared that it "makes no difference" whether developers can sue Apple to recover damages based on exactly the same commissions. Instead, the Ninth Circuit makes dispositive the delivery of goods—a concept that other circuits find irrelevant because it "does not affect the economic substance of the transaction." *See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005) *cert. denied*, 547 U.S. 1163 (2006). Effectively, the Ninth Circuit has embraced Justice Brennan's dissent in *Illinois Brick*, prioritizing the availability of a consumer damages remedy over all other considerations, including this Court's express mandate to avoid duplicative remedies.

This acknowledged circuit conflict implicates questions of exceptional national importance because of the explosive growth of electronic commerce. The Ninth Circuit has approached this case as if all commerce fits the traditional resale distribution model, where the party who delivers goods is also the party who sets the price the consumer pays. But

increasingly this is a world of electronic commerce based on electronic marketplaces that—like Apple's App Store—are structured around an agency or consignment sales model where the marketplace sponsor has nothing to do with the pricing of the goods it sells. StubHub, eBay, Google's Play marketplace, Amazon's "Amazon Marketplace" business, and Facebook's "Marketplace" are prominent examples of agency-based electronic marketplaces. The U.S. Census Bureau estimates that in 2016, e-commerce accounted for $389.9 billion in retail sales, and that number is steadily growing. *See* U.S. Dep't of Commerce, U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales: 1st Quarter 2017* at 2 (May 16, 2017), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. As a result, the Ninth Circuit's decision "is not some narrow ruling that will not extend far beyond the specific facts presented. The scope of the Ninth Circuit's decision has the potential to be vast." Anthony W. Swisher & Jody Boudreault, *Will Antitrust Class Action Involving Digital Store Dismantle 'Illinois Brick' Rule on Indirect Purchasers?*, The WLF Legal Pulse (Feb. 7, 2017), https://wlflegalpulse.com/2017/02/07/will-antitrust-class-action-involving-digital-store-dismantle-illinois-brick-rule-on-indirect-purchasers/.

The Ninth Circuit's "distributor function" test is blind to the economics of agency-based e-commerce marketplaces, and at odds with this Court's *Illinois Brick* doctrine. Certiorari is necessary to restore uniformity among the circuits, to make clear that the actual decisions of this Court are and remain the law, and to relieve the electronic commerce sector from a dangerous decision.

STATEMENT OF THE CASE

A. iPhone, Apps, and the App Store

In June 2007, Apple introduced the iPhone, the company's first cellular telephone product. Pet. App. 41a (¶ 2). The iPhone was a "novel," "revolutionary," and "breakthrough" product that "shifted the paradigm for smartphones, and . . . changed the entire cell phone manufacturing industry." *Id.* at 42a, 41a, 48a (¶¶ 7, 2, 26).

One of Apple's most substantial innovations associated with the iPhone involved add-on software applications, apps. Apple designed—from the ground up—an ecosystem for the use, development, sale, and distribution of apps. That ecosystem began with the initial design decision for the iPhone operating system, iOS, which will only download software applications obtained through the App Store, all of which have been vetted and approved by Apple. *Id.* at 49a (¶¶ 30-31).

The apps themselves, however, are made by thousands of registered iOS app developers who participate in the multi-billion dollar "apps economy." In March 2008, Apple released a software development kit ("SDK") for third-party developers to create approved apps for the iPhone. *Id.* at 41a, 51a-52a (¶¶ 2, 38-40). In July 2008, Apple launched the App Store, the electronic marketplace for developers to offer and distribute iOS apps to customers around the world. *Id.* at 51a (¶ 39). Apple structured the App Store around an agency sales model: developers set the price (if any) for an app, and Apple acts as the sales and delivery agent. Apple provides a variety of services to developers, including reviewing apps for safety and compatibility, hosting the App Store, and collecting the purchase price (if any) from consumers on the

developer's behalf. Apple charges the developer a 30% commission on consumer apps purchases. *Id.* at 52a (¶ 41).[2]

Apple's innovations regarding the iPhone, iOS operating system and App Store created a dynamic new industry where none had existed before. Respondents acknowledge that as of 2012, just four years into its existence, the App Store "offer[ed] more than 850,000 apps" for consumers. *Id.* at 43a (¶ 9). That number is far greater today. Apple has publicly announced that as of January 2017, the App Store offered 2.2 million apps, with iOS app developers earning over $20 billion in 2016 alone.[3]

Respondents nevertheless claim that Apple has restricted competition in iPhone apps. The operative complaint alleges two claims under § 2 of the Sherman Act, for monopolization and attempted monopolization of a supposed "aftermarket" limited to distribution services for iPhone apps. *Id.* at 60a-62a (¶¶ 70-80). It principally contends that Apple violated the antitrust laws by adopting a "closed" ecosystem for iPhone apps, which allows Apple to charge an excessive 30% commission. *Id.* at 41a-43a, 45a, 51a-52a, 54a-55a (¶¶ 4, 6-8, 14, 40-41, 48, 50).

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[2] iOS developers are also required to pay Apple an annual $99 subscription fee. Pet. App. 51a (¶ 38). Furthermore, in recent years Apple's commissions have come primarily from "in-app purchases" (IAPs) rather than the initial sale of the app. IAPs are typically extra content for the native app that the developer offers to users, either by subscription or *a la carte*.

[3] *See* Press Release, *App Store shatters records on New Year's Day* (Jan. 5, 2017), https://www.apple.com/newsroom/2017/01/app-store-shatters-records-on-new-years-day/.

B. District Court Proceedings

As the Ninth Circuit notes, the procedural history of this case is complex. It originated as the second of three putative class actions filed by the same counsel alleging that Apple's introduction of the iPhone violated antitrust laws in multiple ways. Numerous twists and turns later, this case focuses exclusively on Respondents' allegations about the App Store.

Apple moved to dismiss the complaint under *Illinois Brick*, arguing that Respondents had not alleged, and could not allege, anything other than a pass-through injury. While that is in fact undeniable, earlier versions of Respondents' complaint had been studiously vague about whether Apple adds a 30% charge *on top* of the app price set by the developer, or instead (as is true) Apple charges a 30% commission *to the developer*, based on the price that the developer sets and the consumer pays. The district court thus pressed Respondents to clarify those allegations. The final, operative complaint alleges that (i) "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple a share of third party's sales proceeds," (ii) "the full purchase price[] includ[es] Apple's 30% commission," which is paid directly to Apple, and (iii) "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." Pet. App. 49a-50a, 52a (¶¶ 32, 41).

The district court found that "the [complaint] is fairly read to complain about a fee created by agreement and borne by the developers to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of their purchase price." *Id.* at 36a. The court correctly recognized that

therefore the harm alleged by Respondents "is an indirect effect resulting from the software developers' own costs," *id.* at 37a, and dismissed the complaint for lack of antitrust standing under *Illinois Brick*.

C. The Ninth Circuit's Decision

The Ninth Circuit reversed. Pet. App. 22a.[4]

The Ninth Circuit's decision contains no discussion of whether Respondents' damages claim presents pass-through issues—the *sine qua non* of any *Illinois Brick* analysis. Instead, the panel reasoned that "[t]he key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." *Id.* at 20a-21a. The panel held that there is a "fundamental distinction between a manufacturer or producer, on the one hand, and a distributor on the other," that the "distributor" is the party "who 'supplies the product directly to' plaintiffs," and that consumers always have standing to sue a "distributor," no matter what. *Id.* at 19a-21a (citation omitted). Under this "bright line," approach, the panel reasoned that because Apple delivers apps to the consumer, it acts as a "distributor," and therefore consumers are direct purchasers of apps from Apple. *Id.* at 21a.

The Ninth Circuit explained in some detail what, in its view, *did not* matter. The fact that "Apple does not

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[4] Preliminarily, the Ninth Circuit affirmed the district court's decision that it had discretion to consider Apple's renewed *Illinois Brick* motion. Respondents had argued that the motion was improper under Federal Rule of Civil Procedure 12(g) because Apple had not raised *Illinois Brick* in prior Rule 12 motions. The district court held that Respondents' position would serve only to delay the litigation and multiply costs, in violation of the principles stated in Federal Rule of Civil Procedure 1.

take ownership of the apps and then sell them to buyers after adding a markup" was unimportant because "the distinction between a markup and a [sales] commission is immaterial. . . . The key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." *Id.* at 20a-21a.

In a similar vein, the Ninth Circuit emphasized that it "d[id] [not] rest [its] analysis on who determines the ultimate price paid by the buyer of an iPhone app." *Id.* at 21a. Indeed, the Ninth Circuit's indifference to that issue led it to be careless about the record evidence regarding how apps prices are set. It stated correctly that "the price is determined as a practical matter by the app developer," but incorrectly that "Apple's thirty percent commission is added automatically" to the price set by the developer. *Id.* Although diametrically opposed, *either* fact would suffice for the Ninth Circuit's analysis because the "distributor function" rule does not care how prices are set.

The Ninth Circuit also held that "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Id.* at 20a. This was despite the panel's recognition that an affirmative answer to that question "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple" for the same commissions Respondents challenge here. *Id.* The panel thus expressly opened the door to duplicative recoveries by different plaintiff groups.

The Ninth Circuit acknowledged that it was creating a circuit split with at least the Eighth Circuit's decision in *Campos*, by endorsing the dissent's

reasoning in that case. *See id.* at 19a ("We disagree with the majority's analysis in *Ticketmaster*.").

Apple sought rehearing *en banc*, but the court of appeals denied the petition without opinion. *Id.* at 38a-39a

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision merits review, first, because of the acknowledged split with the Eighth Circuit's *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) decision, which is even broader than the Ninth Circuit recognized.

Campos considered an electronic marketplace structured around an agency sales model, much like the App Store. The Eighth Circuit approached the *Illinois Brick* issues properly, rejecting any formalistic focus on distribution—including the fact that Ticketmaster transacted with, and delivered tickets to, consumers. More important was that the consumer plaintiffs were complaining about the monopolization of a service (ticket distribution services) that Ticketmaster provides not to the plaintiff ticket buyers, but *to concert venues* (much as Apple provides distribution services to app developers). The Eighth Circuit therefore reasoned correctly that the plaintiffs' injury had to be a derivative one, undoubtedly presented pass-through issues, and therefore was barred by *Illinois Brick*.

Asked by this Court for its views, the Solicitor General opined that "the court of appeals' holding that the direct purchaser rule of *Illinois Brick* . . . precludes petitioners from recovering damages . . . based on

Ticketmaster's alleged overcharges is both correct and conventional." *Campos* U.S. & FTC Br. 5-6.

The Ninth Circuit's contrary approach cannot be reconciled with this Court's precedents in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The whole point of those decisions was to identify the one plaintiff (or class of plaintiffs) who paid the disputed charge directly and to give that plaintiff exclusive standing to sue for the entire overcharge. Any claims that would depend on allegations of pass-through harm are barred, in order to avoid complex factual disputes about apportionment and duplicative recoveries. The dissenters in *Illinois Brick* would have approached these issues differently, based on their view that Congress, in enacting Section 4 of the Clayton Act, 15 U.S.C. § 15, "intended to protect individual consumers who purchase through middlemen." *Illinois Brick*, 431 U.S. at 749 (Brennan, J., dissenting).[5] But the *Illinois Brick* majority adopted a different interpretation of Section 4, and the Court in *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990), chose to "stand by [that] interpretation." The Ninth Circuit does not have the authority to change that.

By focusing only on whether the defendant delivers or "distributes" goods to the plaintiff, the Ninth Circuit's new standard divorces the *Illinois Brick* doctrine from the objectives that this Court identified

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[5] The author of the panel opinion made clear at the opening of oral argument that he thinks "Justice Brennan got it right in *Illinois Brick*." CA9 Oral Argument at 4:20, *Pepper v. Apple Inc.*, No. 14-15000 (Feb. 10, 2016), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009059.

as critical. Who *delivers goods* is not even germane to this Court's *Illinois Brick* analysis, as the Third Circuit correctly held in *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006). There is not a word in *Hanover Shoe*, *Illinois Brick*, or *UtiliCorp* suggesting that this Court thought that the right way to approach an *Illinois Brick* issue is to force the facts into a manufacturer-distributor dichotomy, let alone emphasize the "distributor's" role in delivering goods. In contrast, the focus on pass-through dynamics—"the intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits"—is pervasive. *Illinois Brick*, 431 U.S. at 744. The only thing that can be said with certainty about the Ninth Circuit's approach is that it will always permit the ultimate consumer to sue someone—the outcome favored by the *Illinois Brick* dissent but rejected by the majority. The Ninth Circuit would not even rule out duplicative litigation by app developers to recover *the exact same commissions* from Apple, a clear repudiation of the policies against double recovery that drive *Illinois Brick*.

The Ninth Circuit's decision implicates issues of exceptional national importance. This is not a one-off case that can be dismissed as an outlier. Along with *Campos*, it is the most important case to have come along testing the application of *Illinois Brick* to electronic marketplaces. Those marketplaces serve hundreds of billions of dollars in commerce annually, and they are growing fast. The Ninth Circuit's new test essentially treats operators of electronic marketplaces as if they were the owners and direct sellers of every item that passes through their

marketplaces, and as if a commission that *sellers* have agreed to pay is actually charged to and paid by *buyers*. Worse, it appears to allow both buyers and sellers to sue, and potentially to recover twice for the exact same charges. That is a punitive and unwise way for antitrust law to treat some of our most vibrant and important new industries. And since the technology companies operating these marketplaces are disproportionately located in the Ninth Circuit, and in any event do a tremendous volume of business there, class actions of this nature will be brought in the Ninth Circuit. Deferring review in hopes of further percolation therefore would be inappropriate. This Court should step in now.

I. THE NINTH CIRCUIT'S "DISTRIBUTOR FUNCTION" RULE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The Ninth Circuit acknowledged that its decision conflicts with the Eighth Circuit's decision in *Campos*. That conflict—broader than the Ninth Circuit acknowledged—merits review.

Campos is the leading case applying *Illinois Brick* to an agency sales arrangement like the App Store, and an example of a court looking beyond superficialities of form and deep into the substance of a plaintiff's claim to determine whether its damage theory implicated pass-through concerns. Buyers of concert tickets sued Ticketmaster for allegedly monopolizing the market for ticket distribution services for large-scale popular music events. *Campos*, 140 F.3d at 1168-69. They sought to recover damages based on allegedly supracompetitive ticket service fees they paid "directly to Ticketmaster." *Id.* at 1171. The allegedly monopolized services, however, were purchased by

concert venues, not plaintiffs. Ticketmaster was transacting business with the consumer plaintiffs because it had entered into venue agreements whereby the venues granted to Ticketmaster a right "to sell [tickets] as Principal's agent." *Campos* U.S. & FTC Br. 9. Indeed, those agreements set the "service fees" and "handling fees" that ticket buyers paid. Ticketmaster's actual compensation for its distribution services was set by contract with the venues. *Campos*, 140 F.3d at 1169.

The Eighth Circuit held that because the ticketing fee was a product of and reflected Ticketmaster's alleged upstream monopoly power over concert venues—the only purchasers of the monopolized service—the directly injured parties were the venues rather than the consumers. First the court held that the "billing practice[ ]," that Ticketmaster transacted with plaintiffs and collected a distinct service fee on each sale, was not determinative. *Id.* at 1171 ("[E]ven if a separate charge for gasoline were assessed [to a taxi passenger], the taxi passenger still could not be considered a direct purchaser [of gasoline] in any sense." (first alteration added) (quoting *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853 n.17 (3d Cir.), *cert. denied*, 519 U.S. 825 (1996))). What mattered more was the fact that the venues plainly were the first and most direct victims of the allegedly illegal conduct, since they alone purchased the allegedly monopolized service. Ticket buyers were indirect purchasers because, while they may indeed have paid "some portion of the monopoly overcharge," they did so "only because the previous purchaser [the venue] was unable to avoid that overcharge." *Id.* at 1170.

As noted earlier, the Solicitor General reviewed the *Campos* decision at this Court's invitation, and agreed it was correct:

> It would be contrary to the rationale of *Illinois Brick* to allow ticket buyers to recover damages attributable to Ticketmaster's alleged monopoly overcharges merely because of the particular nature of the input that Ticketmaster supplies to the venues (*i.e.*, Ticketmaster's services as the venues' agent in dealing with ticket buyers). Clearly, the venues could also assert claims for overcharge damages as direct purchasers of Ticketmaster's services. If ticket buyers could recover damages for those same overcharges, Ticketmaster would face the risk of duplicative damages liability, a risk that this Court "d[id] not find * * * acceptable" in *Illinois Brick*[,] 431 U.S. at 731 n.11. Or, alternatively, the courts would have to engage in "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," *id.* at 737, the very exercise that the direct purchaser rule of *Illinois Brick* was designed to avoid.

Campos U.S. & FTC Br. 12 (third alteration added).

The United States also directly addressed the proper treatment of agency selling arrangements like the App Store. It explained that because Ticketmaster was acting "as the venue's 'agent' for ticket distribution services," consumers were direct

purchasers *from the venues* rather than from Ticketmaster, "even though ticket buyers . . . deal with Ticketmaster, and not with the venue, when they purchase tickets." *Id.* at 10; *see also id.* at 14 (explaining that *Campos* correctly applies *Illinois Brick* principles to "the unusual case, such as this one, in which the monopolist, as agent for the direct buyer, deals with the indirect buyer").

Apple would clearly prevail under *Campos*. Like Ticketmaster, it is an agent selling goods for principals, accused of monopolizing a distribution service sold to the principals. Consumers in both cases are "downstream," buying the principals' goods at allegedly inflated prices. If anything, this is an easier case than *Campos* because tens of thousands of app developers set apps prices, creating unimaginably complicated pass-through issues. Yet the Ninth Circuit's "distributor function" rule ignores those issues altogether.

No Circuit other than the Ninth uses this "distributor function" rule; the only out-of-circuit citation by the Ninth Circuit was to the *Campos* dissent. And in *Dentsply*, the Third Circuit specifically rejected the proposition that who delivers goods prevails over who sells them. 424 F.3d at 372-73. In that case, various groups of dental labs tried to sue Dentsply for monopolization, even though artificial teeth are typically sold by manufacturers (such as Dentsply) to middle-man dealers, which then add a markup and resell the teeth to dental labs. *Id.* at 366. One group of labs argued that at least when Dentsply drop-shipped the teeth straight to the labs, the labs "were direct purchasers not subject to *Illinois Brick*." *Id.* at 372. The Ninth Circuit, following the principles

of the decision below, would have agreed: since Dentsply handled the marketplace "function" of delivering the goods to the labs, the labs were direct purchasers. But the Third Circuit gave that argument short shrift. It sensibly recognized that the delivery of the goods by the manufacturer was only a "formal difference" that "d[id] not affect the economic substance of the transaction." *Id.* at 373. The economic substance was that the labs were buying from the dealers, paying the dealers "their usual price," which reflected "the dealers tak[ing] their profit." *Id.*

By crafting a new "distributor function" approach to *Illinois Brick* that elevates form over substance, the Ninth Circuit has created a clear and acknowledged circuit split that should be resolved by this Court.

II. THE NINTH CIRCUIT'S DECISION PERMITS PASS-THROUGH DAMAGES AND DUPLICATIVE RECOVERIES, IN SQUARE CONFLICT WITH THIS COURT'S DECISIONS

Certiorari is also merited on the basis of a square conflict with this Court's decisions, and a resulting multi-layered conflict with how other circuits approach *Illinois Brick* generally. In short, the Ninth Circuit has ignored the fundamental policies underlying *Illinois Brick*—avoiding pass-through theories of harm and duplicative recoveries—in favor of a formalistic distinction that finds no support in this Court's or other circuit courts' decisions.

A. The *Illinois Brick* Doctrine Does Not Permit Pass-Through Theories Of Harm

The *Illinois Brick* doctrine is about one recurring problem in antitrust litigation: what to do when the effects of anticompetitive conduct get "passed-through" a distribution chain. *Hanover Shoe* and *Illinois Brick* successively dealt with the two sides of the pass-through problem, and together ensure that courts and juries hearing antitrust cases never need to evaluate whether some or all of an alleged overcharge was, or was not, passed through to subsequent purchasers.

In *Hanover Shoe*, this Court held that an antitrust defendant could not lessen its exposure to damages with a pass-through *defense*, *i.e.*, it could not say that the plaintiff suffered no loss or less loss because it had passed on the overcharge, in whole or in part, to its own customers. 392 U.S. at 489, 492. Rather, the Court held, for purposes of Section 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff that purchased goods or services at an inflated price as a result of anticompetitive conduct by a supplier has suffered damage in the *full amount* of the overcharge. *Hanover Shoe*, 392 U.S. at 487-91. Allowing even a limited pass-on defense, this Court recognized, would inevitably lead to "complicated proceedings involving massive evidence and complicated theories" aimed at economic incidence and pass-through issues that are notoriously difficult to unravel, seriously threatening the vitality and practicality of antitrust enforcement. *Id.* at 493.

In *Illinois Brick*, this Court addressed the other side of the same coin—whether an indirect purchaser, who bears an overcharge only to the extent that it was passed on by a direct purchaser, can sue for damages.

431 U.S. at 724. The Court held that Section 4 of the Clayton Act precludes the use of pass-through theories of harm by plaintiffs as well. *Id.* at 735. In this Court's view, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 734-35. This Court carefully considered an asymmetric outcome whereby plaintiffs could pursue pass-through theories (even if defendants could not under *Hanover Shoe*), but rejected that approach because of the "serious risk of multiple liability for defendants" that would result. *Id.* at 730. The holding of *Illinois Brick* is that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the [Clayton Act]." *Id.* at 729.

Justice Brennan dissented, arguing essentially as a matter of statutory construction that Congress intended that consumers would always have a damages claim. In particular, the dissent divined, from recent legislation allowing *parens patriae* actions by States on behalf of their citizens, that Congress must have favored consumer class actions generally, irrespective of whether they presented pass-through issues. *Id.* at 765 n.24 (Brennan, J., dissenting). The majority rejected this argument. *Id.* at 733 n.14. The dissent also argued that apportioning an overcharge throughout a distribution chain is no more difficult than other challenges in antitrust litigation. *See id.* at 758-59 & n.14 (Brennan, J., dissenting). The majority disagreed with that too, adding: "In any event, as we understand the dissenters' argument, it reduces to the

proposition that, because antitrust cases are already complicated, there is little harm in making them more so. We disagree." *Id.* at 743 n.27.

The Court reaffirmed its *Illinois Brick* analysis in *UtiliCorp*, which addressed who may sue "when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers." 497 U.S. at 204. Two states, suing as *parens patriae* on behalf of consumers and state agencies that purchased natural gas from the defendant utility, argued that indirect purchaser suits should be allowed "in cases involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208. The Court disagreed, reasoning that there was a pass-through issue even on these facts, and that it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick* simply because some cases are easier than others. *Id.* at 217. "Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4." *Id.*

Most other circuits have recognized, repeatedly and correctly, that antitrust standing under *Illinois Brick* turns on whether the plaintiff's particular claim presents a theory of pass-through harm. The Fifth Circuit has explained that "[w]hat is critical" to an *Illinois Brick* analysis is "whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory." *Pony Creek Cattle Co. v. Great Atl. & Pac. Tea Co. (In re Beef Indus. Antitrust Litig.)*, 600 F.2d 1148, 1160 (5th Cir. 1979). The Sixth Circuit has explained that if a plaintiff's theory of harm would require it to "prove what portion of the [alleged] illegal overcharge" was "passed on in the form of a higher

price" for what he purchased, his claim is barred. *Jewish Hosp. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 974 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). The Fourth Circuit's decision in *Dickson v. Microsoft Corp.* holds that whenever "the court would be required to determine the over-charge, if any, for [the monopolist's product] that was passed on to consumers," *Illinois Brick* bars the claim. 309 F.3d 193, 215 (4th Cir. 2002). The leading antitrust treatise urges antitrust courts to focus on this economic substance, explaining: "When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects." 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007).

Respondents' damages claim against Apple clearly depends on a theory of pass-through harm that would require the trier of fact to tackle exactly the questions that *Illinois Brick* placed off-limits. Respondents complain of a 30% commission that Apple charges developers, and claim that as a result of that commission the prices of apps are higher than what they otherwise would be. *See* Pet. App. 43a, 52a (¶¶ 8, 41). The district court found, Respondents effectively concede,[6] and it is undeniably the case that Apple's 30% commission will impact consumers only to the

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[6] *See* CA9 Plaintiffs-Appellants Opening Br. 35 n.10 (acknowledging that the commission Apple imposes on third-party developers causes those developers to "mark-up the price [of their apps]").

extent that it has some effect on the prices third-party developers choose for the apps they sell through the App Store. Yet *how* it will affect the pricing decisions of developers—and therefore how apps buyers are affected—is precisely the question that *Illinois Brick* did not want antitrust courts to entertain. *See* 431 U.S. at 732 ("[T]he attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble damages proceedings . . . ."); *see also Hanover Shoe*, 392 U.S. at 493 (the Court does not allow proof of what the direct purchaser might have done because of the "nearly insuperable difficulty" of the issue).

The pass-through issues presented here are in fact exceptionally difficult. One cannot just assume that if Apple's commission did not exist, developers would want to price every one of the millions of apps in the App Store exactly 30% lower. Under the relevant "tax incidence" analysis, economically rational app developers would consider the particular supply and demand conditions *for each app*, and choose prices accordingly.[7] A pass-through analysis would therefore

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[7] In *Illinois Brick*, the Court noted the basic principle of "tax incidence" analysis. *See* 431 U.S. at 741 ("*If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product." (emphasis added)). The Court also noted how hard this principle is to implement in practice, highlighting "a serious problem of measuring the relevant elasticities." *Id.* at 742. Here, where each App will have a unique cost structure and unique

require one to estimate but-for pricing decisions app-by-app countless times.[8]

Contrast that complexity with the zero-tolerance approach to pass-through that this Court adopted in *UtiliCorp*. In *UtiliCorp* there was a credible argument that regulated utilities *always* pass on 100% of natural gas price increases to consumers, who *necessarily* pay the same regulated energy prices. This Court nevertheless disallowed *parens patriae* actions on behalf of consumers. 497 U.S. at 208-12. The Court wrote: "As we have stated before, '[t]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.'" *Id.* at 211 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982)). Therefore, acknowledging that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," *id.* at 216, the Court found the seemingly simple pass-through issue disqualifying, *see id.* at 210-11.

Despite these facts and this Court's doctrine, the Ninth Circuit's decision *fails even to discuss whether Respondents' damages claims would implicate pass-through dynamics*. That had been the district court's focus, and it found that the harm alleged by Respondents "is an indirect effect resulting from the

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elasticities of supply and demand, the complexities are as daunting as they possibly could be.

[8] It is actually much worse than that, since as noted earlier iOS developers today make most of their money from in-app purchases. Accordingly, true but-for prices would be a combination of the up-front app price plus in-app purchases. And as if that is not enough, developers usually make a version of their iOS apps for other platforms, like Android, and generally strive to adopt the same pricing structure across platforms.

software developers' own costs." *But the Ninth* Circuit's sole focus on "functions" was so extreme that it failed to address this finding or any other aspect of the pass-through issue. This willful indifference to the pass-through problem may be its strongest repudiation of this Court's doctrine.

The bottom line is that if Respondents have a damages action against Apple, it necessarily will require the trier of fact to consider whether, and to what extent, Apple's commission was passed through in the prices that developers selected for the particular apps that Respondents purchased. That is precisely the enterprise that this Court placed off-limits in *Illinois Brick* and *Hanover Shoe*, and that other circuits consistently recognize as the most important consideration in any *Illinois Brick* analysis.

B. The *Illinois Brick* Doctrine Does Not Permit Duplicative Recoveries

Hanover Shoe and *Illinois Brick* also work together to ensure that suits by indirect purchasers do not lead to duplicative recoveries. *See Illinois Brick*, 431 U.S. at 731 ("[W]e are unwilling to 'open the door to duplicative recoveries' under § 4." (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)); *see also UtiliCorp*, 497 U.S. at 208, 212, 214.

The Ninth Circuit, however, was openly indifferent to the prospect of duplicative recoveries here. It held that "it makes no difference to our analysis" "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick*," even if that "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit" themselves and seek Apple's 30% commission as damages. Pet. App. 20a.

To any antitrust lawyer that has been practicing for the past 40 years, this is nothing short of heresy. It is fundamental that the *Illinois Brick* doctrine seeks to identify the *one* set of plaintiffs in the chain of distribution who can sue for the *entire* overcharge, to the exclusion of every other possible plaintiff. As the Eleventh Circuit has explained, "the direct purchaser rule only permits the first purchaser to recover damages . . . for any unlawful overcharge" in order to "eliminate[] the possibility that direct and indirect purchasers could seek duplicative recoveries against the antitrust violator." *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1285 (11th Cir. 2014). The Third Circuit has similarly recognized that "the scope of *Illinois Brick*'s rule barring treble damages actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery." *Mercan. Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984). Other circuits have likewise applied *Illinois Brick* to deny standing to plaintiffs whose claims would give rise to potential duplicative recoveries. *See, e.g., Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012) (reasoning that in addition to a retail purchaser, "[t]he fact that [an electric utility] would be a proper plaintiff to sue [a wholesale electricity producer] for the same conduct implicates *Illinois Brick*'s concerns about duplicative recovery"), *cert. denied*, 133 S. Ct. 1998 (2013); *Cohen v. Gen. Motors Corp. (In re New Motor Vehicles Canadian Export Antitrust Litig.)*, 533 F.3d 1, 5 (1st Cir. 2008) (holding that permitting car lessees to sue car manufacturers for conspiring to prevent lower priced Canadian cars from entering the U.S. market

would "risk duplicative recovery" as car dealers could also "initiat[e] their own suit"); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30 (D.C. Cir. 1987) (recognizing that under *Illinois Brick* "multiple recovery should be avoided" and thus "allowance of indirect purchaser suits would compel apportionment of recovery"), *cert. denied*, 485 U.S. 961 (1988).

How, then, could a clear prospect of a duplicative recovery not matter to an *Illinois Brick* analysis? The only possible answer is, *if one silently applies the Illinois Brick dissent.* Justice Brennan argued that the risk of duplicative recovery would be relatively small and manageable, and therefore should not stand in the way of consumer overcharge claims. *See Illinois Brick*, 431 U.S. at 761-65 (Brennan, J., dissenting). Yet this Court firmly disagreed, *id.* at 731-32, and *UtiliCorp* reaffirmed that "[t]he *Illinois Brick* rule also serves to eliminate multiple recoveries," 497 U.S. at 212.

Certiorari is necessary to bring the Ninth Circuit back into step with the clear command of this Court's precedents, and the strong consensus of the other circuits. Indeed, the error in saying that it "makes no difference" if two sets of plaintiffs at two different market levels have standing to sue for the same damages is stark enough to warrant summary reversal.

C. The Ninth Circuit's "Distributor Function" Rule Is Unrelated To The Basis For The *Illinois Brick* Doctrine

In lieu of identifying pass-through damages and the potential for duplicative recoveries, the Ninth Circuit would focus on "functions" and delivery. These concepts, however, find no support in this Court's precedents. There is *nothing* in *Hanover Shoe*,

Illinois Brick, or *UtiliCorp* that so much as hints at this approach.

The Ninth Circuit tried to justify its new rule by pointing out that in this Court's leading cases "distributors" were held to be direct purchasers from "manufacturers," and end consumers were held to be direct purchasers from distributors or retailers. That is true, and of course it is often the case that distributors are the direct purchasers from manufacturers, and consumers are the direct purchasers from distributors. The Ninth Circuit has nevertheless confused the legal standard with the particular factual setting to which this Court had occasion to apply that standard. Respectfully, the legal and economic basis for this Court's doctrine is perfectly obvious, and it has nothing to do with shoehorning all commerce into some manufacturer-distributor dichotomy.

The manufacturer-distributor dichotomy does not even fit this case, which concerns agency selling. The reason that "distributors" are usually amenable to suits by consumers is because distributors ordinarily buy from manufacturers and then resell to consumers at prices the distributor sets. Antitrust misconduct by the distributor does not present a pass-through problem in such circumstances, because there is no intermediary between the distributor and the consumer that might absorb some or all of that distributor-established overcharge. In agency selling, however, the agent sets only the commission price charged to its principals (for acting as their agent), not the prices consumers pay for the principals' goods. In the present case, the prices of iOS apps are set entirely by third-party developers, who know with certainty

that the prices they set will be the prices that consumers pay. It therefore makes no sense to liken the agent to a price-setting distributor, when agents like Apple have no price-setting role whatever.

The Ninth Circuit's novel focus on marketplace "functions" and who delivers goods breaks the connection between the *Illinois Brick* rule and the purpose it was designed to serve—keeping antitrust courts out of the business of adjudicating pass-through issues.

III. THE NINTH CIRCUIT'S DECISION PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW BY THIS COURT

The Ninth Circuit's decision destabilizes the law on questions of exceptional importance, particularly to participants in electronic commerce. The Ninth Circuit was oblivious to the ramifications of the agency model by which Apple operates the App Store. Yet the same or similar agency or consignment sales models are increasingly prevalent in online electronic commerce and facilitate billions of dollars in transactions annually. *See* Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, 62 Mgmt. Sci. 2259, 2259-60, 2275 (2016). In addition to Apple's App Store, a few other notable examples of this model are Google's Play (originally "Android") marketplace, StubHub's ticket resale site, eBay's hugely popular auction site, Amazon's "Amazon Marketplace" business, and Facebook's "Marketplace."

The "key distinction between the reselling and agency selling formats is who sets the retail prices—in agency selling the retail prices are decided by the manufacturer, whereas in reselling they are decided by

the e-tailer." *Id.* at 2259-60. As the United States recognized in *Campos*, that difference has crucial consequences for an appropriate application of *Illinois Brick* standing analysis. In an agency sales model the manufacturer or content owner's costs, demand function, incentives, and competitive constraints determine prices product-by-product. *Id.* at 2259, 2264-76. A claim that the commission paid by developers to the platform sponsor ultimately harmed consumers therefore requires exactly the sort of "famously difficult" pass through analysis that *Illinois Brick* forbids.

Nonetheless, essentially every company that sponsors an electronic marketplace "delivers" some goods—the function that the Ninth Circuit found dispositive. StubHub delivers tickets—as the agent of its customer (the ticket seller). Google will deliver a copy of Angry Birds™—as the agent of the developer. And of course Apple delivers apps—as the agent of the developer. Under the Ninth Circuit's decision, every one of these online platform providers may be sued by consumers so long as they have fulfilled the customer's order, even for practices that in the first instance affect developers, content owners, or other upstream entities. All of the considerations that are critical under *Illinois Brick* and the direct purchaser doctrine—pricing dynamics; pass-through dynamics; and even a clear potential for duplicative lawsuits and double-recovery—are irrelevant. That holding is deeply threatening to electronic commerce (as well as to agents and shipping companies in traditional "brick and mortar" commerce) and its effect is especially pernicious given the concentration of electronic commerce companies in the Ninth Circuit. Indeed,

after this decision it seems unlikely that an antitrust class action against the major ecommerce companies would be filed anywhere *other* than the Ninth Circuit.

The Ninth Circuit's decision in this case reopens a Pandora's Box that this Court carefully closed over 40 years ago. It forthrightly conflicts with the Eighth Circuit in *Campos*, and to the considered views of the United States expressed to this Court in *Campos*. And it throws into disarray principles that have long been settled, nationwide, thereby leading once again to complicated judicial proceedings, a lessening of practical and robust antitrust enforcement, and arbitrary and punitive consequences for some of our most important and vibrant emerging industries. Such a profoundly impactful decision should not be left to stand without this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 2017

APPENDIX

RECORD AND BRIEFS

17-204

No. 17-___

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-15000

IN RE APPLE IPHONE ANTITRUST LITIGATION,

Robert Pepper; Stephen H. Schwartz; Edward W. Hayter; Eric Terrell, Plaintiffs–Appellants,

v.

Apple Inc., Defendant–Appellee.

Appeal from the United States District Court for the Northern District of California

Argued and Submitted February 10, 2016
San Francisco, California
Filed January 12, 2017
846 F.3d 313

Before: A. WALLACE TASHIMA and WILLIAM A. FLETCHER, Circuit Judges, and ROBERT W. GETTLEMAN,** District Judge.

OPINION

W. FLETCHER, Circuit Judge:

In their current complaint, Plaintiffs allege that they purchased iPhones and iPhone applications ("apps") between 2007 and 2013, and that Apple has monopolized and attempted to monopolize the market

** The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

for iPhone apps. In ruling on Apple's fourth motion to dismiss, the district court held that Plaintiffs lacked antitrust standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

We must decide two questions. First, we must decide whether Rule 12(g)(2) barred the district court from considering on the merits Apple's fourth motion to dismiss, brought under Rule 12(b)(6), in which Apple contended that Plaintiffs lack statutory standing under *Illinois Brick*. We conclude that the district court may have erred in considering this motion on the merits, but that its error, if any, was harmless. Second, we must decide whether Plaintiffs lack statutory standing under *Illinois Brick*. We hold that Plaintiffs are direct purchasers from Apple within the meaning of *Illinois Brick* and therefore have standing

I. Factual Allegations

The following factual narrative is drawn from Plaintiffs' current complaint. Because the district court dismissed Plaintiffs' suit under Rule 12(b)(6) for failure to state a claim, we take as true all plausible allegations.

Apple released the iPhone in 2007. The iPhone is a "closed system," meaning that Apple controls which apps—such as ringtones, instant messaging, internet, video, and the like—can run on an iPhone's software. In 2008, Apple launched the "App Store," an internet site where iPhone users can find, purchase, and download iPhone apps. Apple has developed some of the apps sold in the App Store, but many of the apps sold in the store have been developed by third-party developers. Apple earns a commission on each third-party app purchased for use on an iPhone. When a customer purchases a third-party iPhone app, the

payment is submitted to the App Store. Of that payment, 30% goes to Apple and 70% goes to the developer.

Apple prohibits app developers from selling iPhone apps through channels other than the App Store, threatening to cut off sales by any developer who violates this prohibition. Apple discourages iPhone owners from downloading unapproved apps, threatening to void iPhone warranties if they do so.

II. Procedural History

The procedural history of this case is complex. We describe as much of the history as is necessary to resolve the procedural question before us. Four named plaintiffs filed a putative antitrust class action complaint ("Complaint 1") against Apple on December 29, 2011. Counts I and II of Complaint 1 alleged monopolization and attempted monopolization of the iPhone app market by Apple. Count III alleged a conspiracy between Apple and AT&T Mobility, LLC ("ATTM") to monopolize the voice and data services market for iPhones. Plaintiffs alleged that they had purchased iPhones, but did not allege that they had ever purchased, or attempted to purchase, iPhone apps. On March 2, 2012, Apple moved to dismiss the entire complaint under Rule 12(b)(7) for failure to join ATTM as a defendant. This motion to dismiss was mooted when the district court consolidated the action with another action.

Seven named plaintiffs, including the original four plaintiffs, then filed a consolidated putative class action complaint ("Complaint 2") against Apple on March 21, 2012. The allegations in Complaint 2 were essentially the same as those in Complaint 1, and the same three Counts were alleged. None of the named plaintiffs

alleged that they had bought, or attempted to buy, an iPhone app. ATTM was not added as a defendant. On April 16, 2012, Apple moved again to dismiss the entire complaint under Rule 12(b)(7) for failure to join ATTM as a defendant. In the alternative, it moved to dismiss Count III under Rule 12(b)(6) for failure to state a claim for conspiracy between Apple and ATTM. The district court granted without prejudice the motion to dismiss the entire complaint, even though Counts I and II alleged no wrongdoing by ATTM. The court specifically ordered Plaintiffs either to add ATTM as a defendant or to forgo Count III. It denied without prejudice Apple's motion to dismiss Count III under Rule 12(b)(6) on the ground that, in the absence of ATTM, the motion was premature.

Plaintiffs filed an amended consolidated complaint ("Complaint 3") on September 28, 2012. Complaint 3 was essentially the same as Complaint 2, except that Count III was now labeled as "Preserved for Appeal." None of the named plaintiffs alleged that they had ever purchased, or sought to purchase, iPhone apps, and ATTM was not named as a defendant. On November 2, 2012, Apple moved under Rule 12(f) to strike Claim III on the ground that ATTM had still not been named as a defendant. As part of the same motion, Apple moved to dismiss Counts I and II under Rule 12(b)(1) for lack of Article III standing, and under Rule 12(b)(6) for lack of statutory standing under *Illinois Brick*. This was the first time Apple had moved to dismiss Counts I and II. Relying on Rule 12(g)(2), Plaintiffs opposed Apple's motion to dismiss under Rule 12(b)(6) on the ground that Apple had not moved to dismiss these claims under Rule 12(b)(6) in its two previous motions under Rule 12.

The district court granted the Rule 12(f) motion to strike Count III. The district court also granted the Rule 12(b)(1) motion to dismiss Counts I and II for lack of subject matter jurisdiction, holding that Plaintiffs lacked Article III standing to bring those counts because Plaintiff failed to allege that they had purchased or attempted to purchase an iPhone app. The court declined to rule on the Rule 12(b)(6) motion to dismiss under *Illinois Brick*, concluding that, in the absence of an alleged Article III injury, any ruling would be advisory. The district court dismissed with leave to amend.

Plaintiffs filed a second amended consolidated complaint ("Complaint 4") on September 5, 2013. Complaint 4 alleged only the iPhone app monopolization claims, which had been Counts I and II of all of the earlier complaints. For the first time, Plaintiffs alleged that they had purchased iPhone apps, thereby alleging sufficient injury under Article III to support Counts I and II. Complaint 4 added the following allegation specifically addressed to statutory standing under *Illinois Brick*

> When an iPhone customer buys an app from Apple, it pays the full purchase price, including Apple's 30% commission, directly to Apple.... Apple sells the apps (or, more recently, licenses for the apps) directly to the customer, collects the entire purchase price, and pays the developers after the sale. The developers at no time directly sell the apps or licenses to iPhone customers or collect payments from the customers.

On September 30, 2013, Apple filed a motion to dismiss under Rule 12(b)(6), contending that Plaintiffs

lacked statutory standing under *Illinois Brick*. The district court agreed and dismissed Complaint 4 with prejudice. Plaintiffs timely appealed.

III. Standard of Review

We review de novo alleged errors of law in interpreting Rule 12. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). We review de novo dismissals for failure to state a claim under Rule 12(b)(6). *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013).

IV. Discussion

Plaintiffs make three arguments on appeal, of which we need to reach only two. First, Plaintiffs argue that Rule 12(g)(2) barred Apple from raising its *Illinois Brick* statutory standing defense in its fourth Rule 12 motion to dismiss, and that the district court erred in deciding the motion on the merits. Second, Plaintiffs argue that the district court erred in characterizing them as indirect purchasers from Apple, and therefore without statutory standing under *Illinois Brick*. We address these two arguments in turn.

A. Late-filed Motions to Dismiss under Rule 12(b)(6)

Rule 12(g)(2) provides, "Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." The consequence of omitting a defense from an earlier motion under Rule 12 depends on type of defense omitted. A defendant who omits a defense under Rules 12(b)(2)–(5)—lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process—entirely waives that defense. Fed. R. Civ. P.

12(h)(1)(A). A defendant who omits a defense under Rule 12(b)(6)—failure to state a claim upon which relief can be granted—does not waive that defense. Rule 12(g)(2) provides that a defendant who fails to assert a failure-to-state-a-claim defense in a pre-answer Rule 12 motion cannot assert that defense in a later pre-answer motion under Rule 12(b)(6), but the defense may be asserted in other ways. Fed. R. Civ. P. 12(h)(2).

Our sister circuits disagree about the proper interpretation and application of Rule 12(g)(2). The Seventh Circuit has held that Rule 12(g)(2) does not foreclose a motion to dismiss under Rule 12(b)(6) when there has been a previous motion to dismiss under Rule 12. *See Ennenga v. Starns*, 677 F.3d 766, 773 (7th Cir. 2012) ("Rule 12(g)(2) does not prohibit a new Rule 12(b)(6) argument from being raised in a successive motion."). The Seventh Circuit misunderstands Rule 12, reading Rule 12(h)(1) to provide the only sanction for failure to raise a Rule 12 defense in a prior motion under the Rule. It is true that Rule 12(h)(1) singles out several Rule 12 defenses for an especially severe sanction. If a defense under Rule 12(b)(2)–(5) is not asserted in the first Rule 12 motion to dismiss, Rule 12(h)(1) tells us that the defense is entirely waived. But Rule 12(h)(2) provides a less severe sanction for failure to assert a defense under Rule 12(b)(6). If a failure-to-state-a-claim defense under Rule 12(b)(6) was not asserted in the first motion to dismiss under Rule 12, Rule 12(h)(2) tells us that it can be raised, but only in a pleading under Rule 7, in a post-answer motion under Rule 12(c), or at trial. *See, e.g., English v. Dyke*, 23 F.3d 1086, 1091 (6th Cir. 1994) (correctly describing the operation of the rule).

The Third and Tenth Circuits have read Rule 12 correctly, but have been very forgiving of a district court's failure to follow Rule 12(g)(2). *See Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 321–22 (3d Cir. 2015) ("So long as the district court accepts all of the allegations in the complaint as true, the result is the same as if the defendant had filed an answer admitting these allegations and then filed a Rule 12(c) motion for judgment on the pleadings, which Rule 12(h)(2)(B) expressly permits."); *Albers v. Bd. of Cty. Comm'rs of Jefferson Cty., Colo.*, 771 F.3d 697, 704 (10th Cir. 2014) ("[W]hether the district court dismissed the complaint based on a motion under Rule 12(b)(6) or rule 12(c) makes no difference for purposes of our review. Therefore, any procedural error that may have been been committed would be harmless and does not prevent us from reaching the merits of the district court's decision.").

We agree with the approach of the Third and Tenth Circuits. We read Rule 12(g)(2) in light of the general policy of the Federal Rules of Civil Procedure, expressed in Rule 1. That rule directs that the Federal Rules "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Denying late-filed Rule 12(b)(6) motions and relegating defendants to the three procedural avenues specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1.

District courts in this circuit and others are well aware of this. For example, as the late Judge Pfaelzer recently wrote:

> Rule 12(g) is designed to avoid repetitive

> motion practice, delay, and ambush tactics. If the Court were to evade the merits of Defendants' ... defenses here, Defendants would be required to file answers within 14 days of this Order. They would presumably assert [the same defenses] in those answers. Defendants would then file Rule 12(c) motions, the parties would repeat the briefing they have already undertaken, and the Court would have to address the same questions in several months. That is not the intended effect of Rule 12(g), and the result would be in contradiction of Rule 1's mandate[.]

Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F.Supp.2d 1164, 1175 (C.D. Cal. 2011) (citations omitted); *see also Banko v. Apple, Inc.*, No. 13–02977 RS, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16, 2013) (internal quotations omitted) ("Although Rule 12(g) technically prohibits successive motions to dismiss that raise arguments that could have been made in a prior motion ... courts faced with a successive motion often exercise their discretion to consider the new arguments in the interests of judicial economy."); *Davidson v. Countrywide Home Loans, Inc.*, No. 09–CV–2694–IEG JMA, 2011 WL 1157569, at *4 (S.D. Cal. Mar. 29, 2011) (internal quotations omitted) ("Rule 12(g) applies to situations in which a party files successive motions under Rule 12 for the sole purpose of delay[.]"); *Doe v. White*, No. 08–1287, 2010 WL 323510, at *2 (C.D. Ill. Jan. 20, 2010) (citing the "substantial amount of case law which provides that successive Rule 12(b)(6) motions may be considered where they have not been filed for the purpose of delay, where entertaining the motion would expedite

the case, and where the motion would narrow the issues involved"). Moore's *Federal Practice* endorses this approach. *See* 2–12 Moore's Federal Practice—Civil § 12.23 ("[B]ecause [a 12(b)(6) defense] is so basic and was not waived, [a district] court might properly entertain a second motion if it were convinced it was not interposed for delay and that addressing it would expedite disposition of the case on the merits.").

Recognizing the practical wisdom of these district courts, and of the Third and Tenth Circuits, we conclude that, as a reviewing court, we should generally be forgiving of a district court's ruling on the merits of a late-filed Rule 12(b)(6) motion. With that in mind, we turn to the case now before us.

Apple's first two motions to dismiss under Rule 12(b)(7), directed to Complaints 1 and 2, were designed to force Plaintiffs to add ATTM as a necessary and indispensable party under Rule 19. These were appropriate motions, given that Count III alleged a conspiracy between Apple and ATTM to monopolize voice and data services, and given that Plaintiffs had sufficiently alleged Article III injury to make that claim. After Plaintiffs filed Complaint 3, which had been amended to recognize the success of Apple's motions under Rule 12(b)(7), Apple moved again to dismiss. It now moved for the first time to dismiss Counts I and II, relying on Rules 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, including for failure to allege injury sufficient for Article III standing, may be made at any time. *See* F. R. Civ. P. 12(b)(1) and 12(h)(3). Apple's earlier Rule 12 motions to dismiss thus in no way foreclosed its late-filed motion to dismiss Counts I and II for lack of Article III standing. The district court

granted Apple's Rule 12(b)(1) motion to dismiss. It refused to decide Apple's Rule 12(b)(6) motion to dismiss for lack of statutory standing on the ground that, in the absence of an Article III case or controversy, a ruling on the motion would be an advisory opinion.

Complaint 4 realleged Counts I and II, and finally alleged, for the first time, that Plaintiffs had purchased iPhone apps. That is, Complaint 4 finally alleged sufficient injury to confer Article III standing to support Counts I and II. Apple moved to dismiss for the fourth time, this time only under Rule 12(b)(6) for lack of statutory standing under *Illinois Brick*.

Apple's motions to dismiss for lack of standing under Rule 12(b)(6), made in its third and fourth motions to dismiss under Rule 12, may not have been late-filed within the meaning of Rule 12(g)(2). Indeed, there is an argument that Apple's motion to dismiss Complaint 3 under Rule 12(b)(6), made as part of its third Rule 12 motion to dismiss, was not late but premature. At that point, Plaintiffs had not alleged injury sufficient to confer subject matter jurisdiction over Counts I and II. For that reason, the district court properly refused to rule on Apple's Rule 12(b)(6) motion, holding that, in the absence of an allegation of Article III standing, any ruling would be advisory. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The district court was willing to decide Apple's Rule 12(b)(6) motion to dismiss for lack of statutory standing only when Plaintiffs finally alleged, in Complaint 4, sufficient injury to confer Article III standing to bring the challenged counts.

Even if we assume arguendo that Apple's motion to dismiss under Rule 12(b)(6), made in its fourth Rule 12 motion, was late, any error by the district court in considering the motion on the merits was harmless. First, the four motions to dismiss, culminating in the motion to dismiss Complaint 4 under Rule 12(b)(6), do not appear to have been filed for any strategically abusive purpose. Apple promptly moved to dismiss each of Plaintiffs' four complaints. Apple's first two motions to dismiss were made on March 2 and April 16, 2012, immediately after the filing of Plaintiffs' first two complaints. Plaintiffs filed Complaint 3 on September 28, 2012. Apple moved to dismiss under Rules 12(b)(1) and 12(b)(6) on November 2, 2012. Plaintiffs filed Complaint 4 on September 5, 2013. Apple moved to dismiss under Rule 12(b)(6) on September 30, 2013. We recognize that Apple could have moved, along with its motion to dismiss for failure to join ATTM under Rule 12(b)(7), to dismiss Counts I and II for lack of subject matter jurisdiction under Rule 12(b)(1). If that motion had been made and granted, Plaintiffs would likely have amended their complaint earlier to allege purchases of iPhone apps. But we see no harm to Plaintiffs caused by Apple's delay in making its Rule 12(b)(1) motion. Second, resort to any of the three default alternatives specified in Rule 12(h)(2)—a pleading under Rule 7(a), a post-answer motion to dismiss on the pleadings under Rule 12(c), or a defense asserted at trial—would have substantially delayed resolution of the *Illinois Brick* statutory standing question, and would have done so for no apparent purpose. The district court's decision on the merits of Apple's Rule 12(b)(6) motion materially expedited the district court's disposition of the case, which was a benefit to both parties.

We therefore conclude that any error committed by the district court in ruling on Apple's motion to dismiss under Rule 12(b)(6) for lack of statutory standing under *Illinois Brick*, if indeed there was error, was harmless. We now turn to the merits of the district court's decision.

B. Standing Under *Illinois Brick*

1. The Direct–Purchaser Rule

Under § 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained[.]" 15 U.S.C. § 15(a). Notwithstanding the statutory term "any person," the Supreme Court has limited those who may sue for antitrust damages. The general rule is that only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution," has standing to sue. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

The rule originated in *Hanover Shoe v. United Shoe Machinery Co.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). Hanover, a shoe manufacturer, alleged that the United Shoe Machinery Corporation had used its monopoly over shoe-manufacturing machinery to lease machines to Hanover at supracompetitive rates. *Id.* at 483–84, 88 S.Ct. 2224. United argued that Hanover had no legally cognizable injury under the antitrust laws because it had passed any illegal overcharge on to its customers. *Id.* at 491, 88 S.Ct. 2224. The Court rejected United's "defensive" use of the pass-on theory. For purposes of antitrust damages, the Court held, the direct purchaser is injured by the full amount of the overcharge irrespective of who

ultimately bears the cost of that injury. *Id.* at 494, 88 S.Ct. 2224.

The Court gave two reasons for its holding. First, the dollar figures necessary to demonstrate that an intermediary has avoided economic injury by passing an overcharge onto his customers were, the Court found, "virtually unascertainable." *Id.* at 493, 88 S.Ct. 2224. A litigant would need to show, among other things, that the intermediary raised the price of his product as a result of the illegal overcharge; that the higher price charged by the intermediary did not affect the intermediary's profits by reducing the volume of sales; and that the intermediary could not or would not have raised its price absent the overcharge. The challenges to making such a showing, the Court observed, would "normally prove insurmountable." *Id.* Second, if an antitrust violator were permitted to defend against suit by showing that the intermediary passed the alleged overcharge onto its customers, those customers would logically be entitled to damages for any portion of the overcharge they paid. In many cases, however, there would be a large number of customers, each of whom would have "only a tiny stake in a lawsuit," and who, in the view of the Court, would thus have "little interest in attempting a class action." *Id.* at 494, 88 S.Ct. 2224. As a result, according to the Court, antitrust violators would "retain the fruits of their illegality because no one ... would bring suit against them." *Id.*

Nine years after *Hanover Shoe*, the Supreme Court rejected an attempt to use the pass-on theory "offensively." In *Illinois Brick*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the State of Illinois sued a concrete block manufacturer for allegedly fixing the

price of concrete blocks. The manufacturer had sold the blocks to masonry contractors who had used the blocks to build masonry structures. The masonry contractors sold the structures to general contractors who put the structures in buildings they sold to the State. The State alleged that the contractors had passed on the manufacturer's illegal overcharge at both stages of the distribution chain, driving up the State's costs by $3 million.

The Supreme Court refused to recognize the passed-on overcharges as a basis for antitrust standing. As in *Hanover Shoe*, the challenges of tracing the effects of an overcharge at each stage of a distribution chain were, in the Court's view, insurmountable. Even if indirect purchasers could meet these challenges, sorting out the complicated variables would clog the courts with protracted and expensive litigation. *Id.* at 732, 97 S.Ct. 2061. And even then problems of administrability and enforcement would remain. Allowing an indirect purchaser to sue for whatever portion of an overcharge it was assessed would either "create a serious risk of multiple liability for defendants," *id.* at 730, 97 S.Ct. 2061, or reduce the effectiveness of antitrust laws by diluting the share of damages better-situated direct purchasers might secure by bringing suit. *Id.* at 731–35, 97 S.Ct. 2061.

The Supreme Court has reaffirmed the *Hanover Shoe/Illinois Brick* rule in a case where the practical considerations that gave rise to the rule were not nearly as compelling as in the two foundation cases. In *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990), customers of public utilities sued natural gas producers for alleged violations of Section 4 of the Clayton Act. Plaintiffs

conceded that they were direct purchasers from the public utilities and indirect purchasers from the producers. But they argued that the direct purchasers, because they were regulated public utilities, had the incentive and ability to build into their pricing structure their entire cost of purchasing natural gas. *Id.* at 205, 110 S.Ct. 2807. On the other side of the coin, because they were public utilities, they had the obligation to pass on the entirety of any cost savings resulting from a reduced purchasing cost. *Id.* at 212, 110 S.Ct. 2807. Therefore, the complications in determining the amount of illegal overcharge that had been, or could be, passed on that had so concerned the Court in *Hanover Shoe* and *Illinois Brick* were largely absent. The Court nonetheless applied the direct/indirect purchaser rule, holding that "[i]n the distribution chain," the customers were "not the immediate buyers from the alleged antitrust violators." *UtiliCorp*, 497 U.S. at 207, 110 S.Ct. 2807.

The transactions in *Hanover Shoe* and *Illinois Brick* have the same structure. In both cases, a monopolizing or price-fixing manufacturer sold or leased a product to an intermediate manufacturer at a supracompetitive price. The intermediate manufacturer (in *Illinois Brick*, two intermediate manufacturers) then used that product to create another product, which was ultimately sold to the consumer. The details in *UtiliCorp* are different, but the basic structure is the same. In *UtiliCorp*, a monopolizing producer sold a product to a distributor at an allegedly supracompetitive price. The distributor then sold the product to the consumer. In all three cases, the consumer was an indirect purchaser from the manufacturer or producer who sold or leased the

product to the intermediary. The consumer was a direct purchaser from the intermediate manufacturer (*Hanover Shoe* and *Illinois Brick*) or from the distributor (*UtiliCorp*). The consumer did not have standing to sue the manufacturer or producer, but did have standing to sue the intermediary, whether the intermediate manufacturer or the distributor.

2. Plaintiffs Are Direct Purchasers

The question before us is whether Plaintiffs purchased their iPhone apps directly from the app developers, or directly from Apple. Stated otherwise, the question is whether Apple is a manufacturer or producer, or whether it is a distributor. Under *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, if Apple is a manufacturer or producer from whom Plaintiffs purchased indirectly, Plaintiffs do not have standing. But if Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing.

We do not write on a clean slate in this circuit. In *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008), plaintiff Bamberg County Memorial Hospital & Nursing Center ("Bamberg") brought suit against Johnson & Johnson ("J & J") alleging that J & J "impermissibly leveraged its monopoly power in sutures to create a monopoly" in the market for endomechanical products. *Id.* at 1118. Bamberg did not purchase medical supplies directly from J & J. Instead, a group purchasing organization ("GPO"), of which Bamberg was a member, negotiated purchasing contracts with J & J and a distributor, Owens & Minor ("O & M"). J & J and O & M, in turn, had a distributorship agreement specifying that O & M would pay J & J the price negotiated by the GPO. Bamberg would purchase from O & M, paying O & M

this price plus a set percentage markup. Pursuant to this agreement, J & J supplied products to the distributor, O & M, which in turn sold and delivered the products to Bamberg, at a price equal to the cost O & M paid for the products plus the set markup determined by a contract between O & M and Bamberg. *Id.* at 1119.

Applying the "straightforward," "bright line" rule of *Illinois Brick*, we held in *Delaware Valley* that Bamberg was an indirect purchaser from J & J, the manufacturer, and a direct purchaser from O & M, the distributor. *Id.* at 1122, 1120. That Bamberg and J & J had a contract setting the wholesale price of the products, and that the price Bamberg paid O & M was "set, in part, by an agreement negotiated . . . on behalf of Bamberg" with J & J were not determinative. *Id.* at 1122. The determinative fact was that O & M was a distributor who sold the products directly to Bamberg. Because Bamberg bought directly from O & M, the distributor, it lacked standing to sue J & J, the manufacturer. The necessary corollary of *Delaware Valley* is that Bamberg would have had standing to sue O & M, the distributor.

The Eighth Circuit has considered a transaction closely resembling the transaction in the case before us. In *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), plaintiffs alleged that Ticketmaster used its monopolistic control over concert ticket distribution services to charge supracompetitive fees for those services. The majority in *Ticketmaster* held that a party's status as a "direct" or "indirect" purchaser turned on whether "an antecedent transaction between the monopolist and another, independent purchaser" absorbed or passed on all or

part of the monopoly overcharge. *Id.* at 1169. Plaintiffs bought concert tickets directly from Ticketmaster, but the majority nevertheless concluded that plaintiffs were indirect purchasers who lacked standing under *Illinois Brick*. *Id.* at 1171. Using an analysis keyed to the "antecedent transaction," the majority concluded that the ticket buyers were indirect purchasers.

We disagree with the majority's analysis in *Ticketmaster*. As Judge Morris Arnold pointed out in dissent, the majority's "antecedent transaction" analysis has no basis in Supreme Court precedent. *Id.* at 1174 (M. Arnold, J., dissenting). *Illinois Brick* held that where plaintiffs are in a "direct vertical chain of transactions" and an intermediary "pass[es] on" monopolistic overcharges originating further up the chain, subsequent buyers lack standing. *Id.* (internal quotation marks omitted). In *Ticketmaster*, "[t]he monopoly product at issue ... is ticket distribution services, not tickets." *Id.* The distributor who "supplies the product directly to" plaintiffs, rather than the producer of the product, is the appropriate defendant in an antitrust suit. *Id.*

Apple argues that it does not sell apps but rather sells "software distribution services to developers." In Apple's view, because it sells distribution services to app developers, it cannot simultaneously be a distributor of apps to app purchasers. Apple analogizes its role to the role of an owner of a shopping mall that "leases physical space to various stores." Apple's analogy is unconvincing. In the case before us, third-party developers of iPhone apps do not have their own "stores." Indeed, part of the anti-competitive behavior alleged by Plaintiffs is that, far from allowing iPhone

app developers to sell through their own "stores," Apple specifically forbids them to do so, instead requiring them to sell iPhone apps only through Apple's App Store.

We do not address the question whether Apple sells distribution services to app developers within the meaning of *Illinois Brick*. If it did, this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple. But whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us.

We do not rest our analysis on the fact that Plaintiffs pay the App Store, which then forwards the payment to the app developers, less Apple's thirty percent commission. Whether a purchase is direct or indirect does not turn on the formalities of payment or bookkeeping arrangements. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1146 (9th Cir. 2003). If Plaintiffs were direct purchasers from Apple solely because Apple collected their payments, Apple could escape anti-trust liability simply by tinkering with the order in which digital banking data zips through cyberspace during a sales transaction.

Nor do we rest our analysis on the form of the payment Apple receives in return for distributing iPhone apps. Apple does not take ownership of the apps and then sell them to buyers after adding a markup of thirty percent. Rather, it sells the apps and adds a thirty percent commission. But the distinction between a markup and a commission is immaterial. The key to the analysis is the function Apple serves

rather than the manner in which it receives compensation for performing that function.

Nor, finally, do we rest our analysis on who determines the ultimate price paid by the buyer of an iPhone app. In the case before us, the price is determined as a practical matter by the app developer who sets a price, to which Apple's thirty percent commission is added automatically. Our opinion in *Delaware Valley* makes clear that this does not make app purchasers direct buyers from the app developers. In *Delaware Valley*, the price paid by the distributor, O & M, to the manufacturer, J & J, was determined through a negotiation between J & J and a GPO of which Bamberg was a member. Despite the fact that Bamberg, through its GPO, had a say in the wholesale price charged by J & J to O & M, to which the distributor added its predetermined markup, we held that Bamberg was a direct purchaser from O & M. Here, the case is even stronger in favor of Plaintiffs. Unlike Bamberg, Plaintiffs have no say whatsoever in determining the price set by the app developer to which the distributor adds its predetermined commission.

Instead, we rest our analysis, as compelled by *Hanover Shoe*, *Illinois Brick*, *UtiliCorp*, and *Delaware Valley*, on the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other. Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps.

Conclusion

We conclude that any error, if indeed there was error, in the district court's consideration of the merits of Apple's Rule 12(b)(6) motion to dismiss for lack of statutory standing was harmless. We conclude further that Plaintiffs are direct purchasers of iPhone apps from Apple under *Illinois Brick* and that they therefore have standing to sue. The district court dismissed Plaintiffs' complaint on the ground that they lacked statutory standing under *Illinois Brick*. We therefore reverse and remand for further proceedings.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE APPLE IPHONE ANTITRUST LITIGATION	Case No.: 11-cv-06714-YGR **ORDER GRANTING APPLE'S MOTION TO DISMISS SECOND AMENDED COMPLAINT WITH PREJUDICE**

The thrust of Plaintiffs' Second Amended Complaint ("SAC") is that Apple has engaged in antitrust conduct by collecting thirty percent of the price of iPhone applications ("Apps") from independent software developers for Apps sold in Apple's App Store. Notably, the SAC is devoid of allegations regarding any attempt on the part of Apple to set fixed prices for Apps, to have acted in concert with the independent software developers to fix said prices, or to otherwise control the independent software developers. Instead, Plaintiffs attempt to plead that they are aggrieved direct purchasers by arguing that the thirty-percent portion obtained by Apple is a direct, fixed cost to consumers who are "first" in the chain to purchase the Apps. In so arguing, Plaintiffs attempt to avoid being categorized as indirect purchasers who pay Apple a fee via a pass-through because in such a situation they would lack standing to allege antitrust claims under *Illinois Brick Co. v. Illinois*. Pending before the Court is Defendant

Apple's Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC"). (Dkt. No. 115.)[1]

Having carefully considered the papers submitted and the pleadings in this action, the arguments of counsel, and for the reasons set forth below, the Court hereby **GRANTS** Apple's Motion to Dismiss **WITHOUT LEAVE TO AMEND.**

I. BACKGROUND[2]

Named Plaintiffs Stephen Schwartz, Edward Hayter, Eric Terrell, and Robert Pepper filed the SAC on their behalf and on behalf of a class of:

> All persons in the United States, exclusive of Apple and its employees, agents and affiliates, and the Court and its employees, who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present.

(SAC ¶ 54.) Plaintiffs allege one claim for unlawful monopolization of an aftermarket for iPhone applications in violation of section 2 of the Sherman Act and a second claim for attempted monopolization of the same aftermarket. The aftermarket of iPhone

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[1] *See also* Plaintiffs' Opposition to Defendant Apple's Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint (Dkt. No. 116) and Apple's Reply in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint (Dkt. No. 118). The Court held oral argument on November 5, 2013.

[2] A detailed procedural and factual background of this action can be found in this Court's Order Granting Apple's Motion to Dismiss Amended Consolidated Complaint ("Prior Order"). (Dkt. No. 108.) The background section of this Order will focus solely on the allegations in Plaintiffs' SAC.

applications "includes the market for distributing software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic and video capability, gaming and other entertainment, Internet applications, and any other downloadable software-driven functions." (*Id.* ¶ 68.)

In terms of this alleged aftermarket, Plaintiffs contend that Apple has instituted, first, "an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of iPhone apps worldwide." (SAC ¶ 3.) Second, Plaintiffs claim that in implementing a closed iPhone operating system, known as an "iOS," the App Store is the only store in the world for iPhone users to buy Apps for their iPhones. (*Id.* ¶¶ 1, 4.) Thus, Apple has "cornered 100% of the distribution market for iPhone applications" and effectively "foreclosed iPhone customers from buying software from any source other than Apple."[3] (*Id.* ¶¶ 3, 7.)

In this market environment, Plaintiffs allege Apple charges and collects a "supracompetitive 30% fee from

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[3] In particular, Apple modified the "open" operating system used in Apple desktop and laptop computers (OS X) to a "closed" iOS for the iPhone, which included security measures and program locks designed to prevent iPhone users from installing and running Apps that were not sold or approved by Apple. (SAC ¶ 30.) Plaintiffs contend that Apple's closed system was not intended to protect its proprietary right to own, sell, or license iOS, but rather, it was closed "for the specific purpose ... of foreclosing competition from other potential iPhone software manufacturers and distributors so that Apple could monopolize and derive monopoly profits from the iPhone apps aftermarket." (*Id.* ¶ 31.)

iPhone consumers" for each App purchased. (SAC ¶ 4; *see also id.* ¶ 6 (referring to the fee as a "30% mark-up"), ¶ 7 ("Apple then forced those foreclosed customers to pay Apple a 30% fee for each and every iPhone app they buy"), ¶ 8 ("charging customers an extra 30% for every app"), ¶ 40 ("30% commission") & ¶ 48 ("30% profit margin").)[4] Plaintiffs concede "the majority of iPhone apps are now free," but also allege that "iPhone consumers have been overcharged hundreds of millions of dollars for paid apps." (*Id.* ¶ 9 (also alleging that Apple offers more than 850,000 Apps and iPhone customers worldwide have downloaded more than 50 billion Apps since July 2008).)

With regard to the relationship between Apple and the independent software developers creating Apps for iPhones, the SAC identifies three notable characteristics. First, "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of* the third party's sales proceeds"—namely, 30% identified as both a "commission" and a "mark-up." (*Id.* ¶¶ 32 (emphasis supplied), 40, 41.) Second, Apple released a "software development kit" to "enable[e] independent software developers to design applications for use on the iPhone" for an annual price of $99. (*Id.* ¶ 38.) Third, Plaintiffs allege Apple "takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer. Apple sells the apps (or, more recently, licenses for the apps) directly to the customer, collects the entire purchase price, and pays the developers after the sale. The developers at no

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[4] Plaintiffs allege that Apple did not disclose to them that Apps could only be purchased from Apple and by "paying Apple's 30% fee." (SAC ¶ 14.)

time directly sell the apps or licenses to iPhone customers or collect payments from the customers." (*Id.* ¶ 41.)

Based on these allegations, Plaintiffs summarily conclude that they have been injured by Apple's conduct "because they paid more for their iPhone apps than they would have paid in a competitive market."[5] (SAC ¶ 45.) Plaintiffs proffer that Apple's 30% fee is an "obvious" monopoly price because the developers' flat $99 annual fee "covers most or all of Apple's costs" in reviewing developers' apps and maintaining the App Store. (*Id.* ¶ 48.) Based on this "obvious" conclusion, Plaintiffs simply equate the 30% fee as "virtually pure profit for Apple." (*Id.*) Plaintiffs then suggest that if developers could sell apps independently, they and discount volume retailers would sell them for "far less than a 30% profit." (*Id.*)

II. DISCUSSION

A. Standard Under Federal Rule of Civil Procedure 12(b)(6)

A complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Fed. R. Civ. P. 12(b)(6). Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699

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[5] Plaintiffs also identify as injuries (i) the deprivation of the "freedom of choosing between Apple's App Store and lower cost market alternatives that would have been available had Apple not monopolized the market" and (ii) "a reduction in the output and supply of iPhone apps, which would have been more abundantly available in a competitive market" if not for Apple's monopoly pricing. (SAC ¶ 45.)

(9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

Mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). As set forth in the seminal antitrust case, *Bell Atlantic. Corp. v. Twombly*, a complaint must plead "enough facts to state a claim [for] relief that is plausible on its face." 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

Apple's Motion to Dismiss sets forth two primary arguments: first, Plaintiffs lack antitrust standing; and second, Plaintiffs fail to state a claim upon which relief can be granted because they do not allege a relevant antitrust market nor any anticompetitive conduct. As

a threshold matter, the Court begins with the issue of antitrust standing.

B. Antitrust Standing

1. Legal Framework of the *Illinois Brick* Doctrine

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that "only direct purchasers have standing under section 4 of the Clayton Act[6] to seek damages for antitrust violations." *Delaware Valley*, 523 F.3d at 1120–21 (citing *Illinois Brick*, 431 U.S. at 735). Under *Illinois Brick*, "only the first party in the chain of distribution to purchase a price-fixed product has standing to sue." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012) ("*In re CRT* "); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012) (a "direct purchaser has 'been injured in its business as required by [§] 4' even though it passes on 'claimed illegal overcharge[s] to' its customers") (quoting *Illinois Brick*, 431 U.S. at 724). Indirect purchasers are precluded from suing "based on unlawful overcharges passed on to them by intermediaries in the distribution chain who purchased directly from the alleged antitrust violator." *In re CRT*, 911 F. Supp. 2d at 864 (citations

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[6] Section 4 of the Clayton Act, 15 U.S.C. section 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." "The Supreme Court has interpreted th[is] section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits." *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120 (9th Cir. 2008).

omitted). While *Illinois Brick* prevented offensive use of a "pass-through" theory by indirect purchasers, it also prohibited defendants from using a pass-on theory to challenge the standing of direct purchasers. *In re CRT*, 911 F. Supp. 2d at 864; *In re ATM Fee*, 686 F.3d at 748.

Standing does not depend exclusively on a purchaser's status as direct or indirect. Standing of indirect purchasers can also be conferred if any of the recognized exceptions to the *Illinois Brick* doctrine applies. *In re CRT*, 911 F. Supp. 2d at 865. In the Ninth Circuit, three exceptions exist which would grant standing, namely when an indirect purchaser can establish, one, "a preexisting cost-plus contract with the direct purchaser" or, two, "a price-fixing conspiracy between the manufacturer and the middleman" where the conspiracy "fix[es] the price paid" by the indirect purchasers. The third exception arises "when customers of the direct purchaser own or control [said] direct purchaser" or "when a conspiring seller owns or controls the direct purchaser." *In re ATM Fee*, 686 F.3d at 749 (citations omitted).[7] There, the indirect purchaser is, in effect, the first non-controlled purchaser.

Here, in its Prior Order, the Court dismissed the prior complaint based on lack of Article III standing and granted leave to amend the complaint to address standing issues. Noting that Plaintiffs bear the burden of alleging the theory and facts upon which they are

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[7] The Ninth Circuit also recognized a potential fourth exception that "indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue." *In re ATM Fee*, 686 F.3d at 749 (noting, however, a lack of clarity regarding whether the exception exists).

proceeding, the Court observed that the allegations in the prior complaint contradicted the arguments made in Plaintiffs' opposition to the prior motion to dismiss. The Court further stated the following:

> The *Apple II* Amended Complaint does not allege a "supracompetitive" or "fixed" price, but rather a mark-up. Plaintiffs allege throughout the Amended Complaint that Apple's conduct has "unlawfully stifled competition, reduced output and consumer choice, and artificially increased prices in the aftermarkets for ... iPhone software applications." (*Apple II* Amended Complaint ¶ 7; id. ¶¶ 11 ("increased price for those applications"), 91 & 97.) Nowhere do Plaintiffs explain how Apple's conduct results in increased "prices" or how said prices were paid. In their Opposition, Plaintiffs confirm that they challenge "only the 30% fee" (Opp. at 13) but also, for the first time, argue that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps" (Opp. at 11 (emphasis in original)). Because the Court's analysis focuses on the actual allegations of the Amended Complaint, and those allegations do not sufficiently identify the basis upon which Plaintiffs are proceeding, the Court declines to issue an advisory opinion analyzing *Illinois Brick* as relevant here.

(Prior Order at 19–20 (footnote omitted) (alteration in original).)

The Prior Order identified two primary areas lacking clarity: (i) the nature of how the 30% fee was paid—whether it was paid directly or through a pass-

through; and (ii) how Apple's alleged conduct resulted in an increased (or marked-up) price and, if so, how it was paid. Plaintiffs' prior briefing stood in stark contrast to the allegations of the prior complaint, which claimed that "Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (Dkt. No. 81 ¶ 5.)

2. Revised Allegations Regarding Antitrust Standing

Plaintiffs contend that the SAC supports two different theories upon which they establish standing as direct purchasers: (1) consumers pay the price of the entire App to Apple directly; and (2) consumers are the only purchasers of Apps and therefore cannot be deemed indirect purchasers. Plaintiffs argue they are straightforward direct purchasers because "Apple *itself* sells every app *directly* to iPhone consumers, Apple *itself* imposes and *directly* collects from iPhone consumers every 30% fee it charges, and Apple's 30% fee is a supracompetitive price that exceeds the prices consumers otherwise would pay for apps had Apple not unlawfully monopolized the iPhone apps aftermarket." (Opposition at 1; *see* SAC ¶ 41.) Said differently, Plaintiffs claim the price of an App has two components: "*the developers' price plus Apple's 30% mark-up*" or Apple's 30% fee "on top of the cost for the apps." (Opposition at 7 (underlined emphasis supplied).) Thus, Plaintiffs argue Apple, as the alleged antitrust violator, "imposes the illegal 30% fee on top of the price of the apps, Plaintiffs purchase the illegal-fee laden apps *directly from Apple*, and Plaintiffs pay the illegal 30% *directly to Apple*, which keeps the entire 30% fee *for itself*." (Opposition at 9 (citing SAC ¶¶ 40–41).) Plaintiffs also point out that only they—the

consumers—purchased the apps. Thus, as they are the *only party* in the chain that buys the "price-fixed" product, Plaintiffs conclude they are straightforward direct purchasers. (Opposition at 9.)

Apple disagrees. Apple concedes that Plaintiffs allege that (i) there is a 30% fee, (ii) the fee is Apple's, (iii) Apple collects said fee, and (iv) consumers pay the fee for every App they purchase. (Motion at 7 (citing SAC ¶¶ 4, 6, 7, 8, 14 & 41).) However, Apple contends that its *collection* of the entire price of the App *from consumers* is irrelevant to the standing analysis: "[t]he fact of a pass-through, rather than the mechanism by which the pass-through is collected, determines indirect purchaser status." (Motion at 8.) Put another way, if the developers first bear Apple's fee, then Plaintiffs do not have standing to pursue their claims regardless of whether the actual collection of the 30% happens directly from consumers to Apple.[8]

Apple emphasizes that the allegations in the SAC support their proposition and explain the interplay between it and the developers vis-à-vis the consumer. Specifically, Apple notes that Plaintiffs allege (i) "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of the third party's sales proceeds*," (ii) that "the full

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[8] Apple emphasizes that Plaintiffs did not amend the complaint to add any allegations that the 30% fee is on top of the cost for the apps; nor did Plaintiffs explicitly explain, as directed by the Court, how the 30% fee is paid by consumers—whether "as a pass-through from developers, or as an entirely separate charge Apple adds 'on top of' the developers' App price when the consumer makes a purchase." (Motion at 8.) Instead, Plaintiffs still acknowledge that Apple earns a commission from the developers, which is "at worst" passed on to Plaintiffs, making their injury indirect. (*Id.* at 1 (citing SAC ¶¶ 40, 41).)

purchase price [ ] includ[es] Apple's 30% commission," which is paid directly to Apple, and (iii) once paid, "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." (SAC ¶¶ 32 (emphasis supplied), 41.) According to Apple, these allegations describe a distribution cost or commission imposed on consumers, which renders them indirect purchasers under *Illinois Brick* because the 30% fee is charged to developers in the first instance and that cost is passed-through to consumers.

3. Analysis

The allegations in the SAC essentially pose the question of whether consumers have standing to challenge the 30% received by Apple for each App sold from an independent software developer. Plaintiffs cast themselves as direct purchasers while Apple argues that they are indirect purchasers.

In re ATM Fee is instructive, and relied upon by both parties. In that case, plaintiff–ATM cardholders alleged that large banks had conspired with the STAR ATM network (which facilitated connections between ATM owners and card-issuing banks) in order to fix a fee that the card-issuing bank paid to an ATM owner when certain transactions were routed over the network. *In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2010 WL 3701912, at *2 (N.D. Cal. Sept. 16, 2010), *aff'd*, 686 F.3d 741 (9th Cir. 2012) (district court's Order Granting Defendants' Motion for Summary Judgment). Specifically, ATM cardholders challenged fees associated with use of ATMs not owned by their card-issuing bank, also known as a "foreign" ATM. 686 F.3d at 744–45. When a cardholder used a foreign ATM, four fees were generated: two paid by the

cardholders and two paid by the card-issuing bank. The fee disputed by plaintiffs was called an "interchange fee" and was paid by the card-issuing bank to the foreign ATM owner. *Id.* at 745. The plaintiffs alleged that the defendants engaged in horizontal price fixing by colluding to fix the price of this "interchange fee," which was then passed-on to the plaintiffs as part of the foreign ATM fee paid by cardholders to the card-issuing bank. *Id.* at 746. As framed by the district court, plaintiffs alleged that "[a]s a result of th[e] alleged 'price fix,' interchange fees [we]re . . . higher than they would otherwise be." 2010 WL 3701912, at *2.

There, the district court observed that plaintiffs *did not allege* that defendants "conspired to illegally fix the foreign ATM fee that [p]laintiffs pay to their bank when they use a foreign ATM." 686 F.3d at 746 (citing district court order). Rather, plaintiffs' complaint was that *their banks paid* an unlawfully-inflated interchange fee, which the banks then passed-on to them through the foreign ATM fee. *Id.* The district court held that because the interchange fee was not directly paid by the ATM cardholder-plaintiffs, they lacked standing to sue under *Illinois Brick*. *Id.* at 750.

The Ninth Circuit affirmed and analyzed the meaning of "fixing" a price.[9] 683 F.3d at 752–53. The Court agreed that "in the *Illinois Brick* context, fixing a price sets the price directly paid, not a price latter [*sic*] passed-on as part of the price at issue." *Id.* at 753. The Court rejected plaintiffs' argument which

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[9] As part of the Ninth Circuit's analysis, the court also examined the co-conspirator exception to *Illinois Brick* to determine whether plaintiffs had standing despite being an indirect purchaser. That exception does not apply here.

attempted to equate price fixing with "conspiring to set a price for the purpose and effect of raising the price at issue," and which would thereby transform the ATM cardholders into direct purchasers. *Id.* at 753. Ultimately, the Court held that "the price paid by plaintiffs must be the price set (not merely 'fixed' in some broad sense) for plaintiffs to be a direct purchaser under the narrowly defined injury requirement of § 4 of the Clayton Act." *Id.* at 754.

Here, at best, Plaintiffs allege that the ultimate price paid by them is somehow "fixed" across-the-board at a level 30% higher than it would otherwise be if not for Apple's conduct. The Court finds that under *In re ATM Fee*, the alleged conduct does not equate to price fixing. Despite Plaintiffs' efforts, the SAC is fairly read to complain about a fee created by agreement and borne *by the developers* to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of the purchase price. Plaintiffs attempt to recast themselves as the sole purchasers of the Apps because Apple collects the entire purchase price is unavailing. To find otherwise would require the Court to ignore the other allegations in the SAC, which identify the developers' obligation to pay or share the thirty percent with Apple. Consequently, the Court finds the SAC does not allege facts from which Plaintiffs can be classified as direct purchasers.

In terms of an analysis of whether Plaintiffs' SAC demonstrates standing for indirect purchasers, the facts required to fall into one of the exceptions under the *Illinois Brick* doctrine are missing. Despite the Court's instruction to do so if they could, Plaintiffs do not allege in the SAC any price "fixed" by Apple. To

the extent that Plaintiffs intimate that developers would necessarily charge only 70% of the purchase price if not for Apple, such conclusion requires the Court to speculate into developers' pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return. Simply put, the Court cannot assume, as Plaintiffs do, that developers charging 99 cents for an App would necessarily have charged 70%, or 69 cents, if not for the agreement with Apple to pay them 30% of the purchase price. Further, the SAC lacks allegations of a conspiracy of any kind.

For the reasons set forth above, the Court finds that the 30% figure for which Plaintiffs complain is not a fixed fee, but a cost passed-on to consumers by independent software developers. As such, any injury to Plaintiffs is an indirect effect resulting from the software developers' own costs. Given that none of the exceptions to the *Illinois Brick* doctrine apply, Plaintiffs are barred from bringing claims because they are indirect purchasers. Having found that Plaintiffs lack antitrust standing, the Court declines to address Apple's further arguments regarding Plaintiffs' failure to state their antitrust claims.

III. CONCLUSION

For the foregoing reasons, Apple's Motion to Dismiss Plaintiffs' Second Amended Complaint is **GRANTED WITH PREJUDICE.**

This Order terminates Dkt. No. 115.

IT IS SO ORDERED.

Dated: December 2, 2013 s/ Yvonne Gonzalez Rogers

Yvonne Gonzalez Rogers
UNITED STATES
DISTRICT COURT JUDGE

FILED
MAY 4, 2017
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: APPLE IPHONE ANTITRUST LITIGATION, ROBERT PEPPER; STEPHEN H. SCHWARTZ; EDWARD W. HAYTER; ERIC TERRELL, Plaintiffs-Appellants, v. APPLE, Defendant-Appellee.	No. 14-15000 D.C. No. 4:11-cv-06714-YGR Northern District of California, Oakland ORDER

Before: TASHIMA and W. FLETCHER, Circuit Judges, and GETTLEMAN,* District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judge Fletcher has voted to

* The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

deny the petition for rehearing en banc, and Judges Tashima and Gettleman so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed January 26, 2017, are **DENIED**.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
OAKLAND DIVISION

In re Apple iPhone Antitrust Litigation	Case No.: C 11-06714-YGR
	SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT
	DEMAND FOR JURY TRIAL

Plaintiffs Stephen H. Schwartz, Edward W. Hayter, Eric Terrell, and Robert Pepper ("Plaintiffs"), for their class action complaint, allege upon personal knowledge as to themselves and their own actions, and upon information and belief, including the investigation of counsel, as follows:

NATURE OF ACTION

1. This is an antitrust class action pursuant to Section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2 (2004) (the "Sherman Act"), brought by Plaintiffs on their own behalf and on behalf of a class of persons similarly situated, those being persons who purchased software applications or licenses for software applications from the "iTunes" site or "App Store" owned and operated by Defendant Apple Inc. ("Apple") for use on an Apple iPhone between

December 29, 2007 and the present (the "Class Period").

A. Summary Of Material Facts

2. With great fanfare, Apple launched its first iPhone, called the iPhone 2G, on June 29, 2007. Prior to and after its launch, Apple hailed the iPhone as a revolutionary, "breakthrough" "smartphone" that functioned like a mobile computer with desktop-class email and other Internet communications capability. Apple built the iPhone's operating system, known as "iOS," to enable iPhone users to download and run computer-like software programs (called "applications" or "apps") to browse the Internet, transform music into cell phone ringtones, take photos, play games and engage in other functions typically performed on desktop or laptop computers.

3. Unbeknownst to iPhone consumers, however, from the time it launched the iPhone through the present date, Apple has engaged in an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of iPhone apps worldwide. As a result of its scheme, Apple has, from introduction of the iPhone 2G in 2007 through the present, cornered 100% of the worldwide distribution market for iPhone applications.

4. Apple has succeeded in totally eliminating any and all competition in that multibillion dollar market. Apple's App Store is the only store in the entire world – online or off-line – where the tens of millions of U.S.-based iPhone owners (and the many tens of millions of iPhone owners worldwide) can buy an iPhone app, and Apple's unlawful monopolization of the apps market

has enabled Apple to charge and collect a supracompetitive 30% fee from iPhone consumers for each and every one of the billions of iPhone apps they have bought since the iPhone's launch six years ago. Consequently, iPhone consumers nationwide have paid hundreds of millions of dollars more for iPhone apps than they would have paid in a competitive market.

5. Unlike traditional desktop or laptop computer manufacturers, whose computers' operating systems allow consumers to buy software applications from any and all competing software distributors, Apple's iOS system prohibits iPhone consumers from buying software applications from anyone other than Apple.

6. Even Apple's own iMac and MacBook desktop and laptop computers' operating systems – from which the iPhone's iOS operating system was derived – allow consumers to buy software from whatever source they like, and to pay the software manufacturer or distributor directly without having to pay an additional fee to Apple. There is no legitimate basis for Apple to treat its iPhone customers any differently than it treats its iMac or MacBook customers, or to charge its iPhone customers a 30% mark-up for any and all software they buy for their iPhones.

7. But when Apple developed its unique iPhone, Apple took advantage of the heavy demand for its novel product to equip it with an operating system that foreclosed iPhone consumers from buying software from any source other than Apple, and Apple then forced those foreclosed consumers to pay Apple a 30% fee for each and every iPhone app they buy. Stated in antitrust terminology, Apple improperly exploited its relationships with customers who purchased Apple's highly desirable and expensive iPhone by locking them

in, without their knowledge or consent, into an aftermarket for iPhone apps that was monopolized by Apple.

8. Apple's motive for its anticompetitive conduct was simple: Apple did not want its iPhone-related revenue stream to end when a consumer bought an iPhone, like it generally does when consumers purchase iMac and MacBook computers. So Apple concocted and maintained a plan to continue generating additional revenues over the entire useful life of every iPhone it sold by cornering the distribution market for iPhone applications and charging consumers an extra 30% for every app. Through this scheme Apple would profit not only from the sales of tens of millions of iPhones, it would also profit from each and every one of the billions of future apps sales made to Apple's iPhone customers.

9. Apple's anticompetitive scheme has generated enormous supracompetitive profits for Apple. Apple now offers more than 850,000 apps, and iPhone consumers worldwide have downloaded apps more than 50 billion times since July 2008. While the majority of iPhone apps are now free, United States iPhone consumers have been overcharged hundreds of millions of dollars for paid apps during the Class Period as a result of Apple's anticompetitive conduct.

10. That Apple has engaged in unlawful monopolistic behavior with respect to iPhone apps is perfectly consistent with Apple's attitude towards antitrust compliance generally. A federal district court judge who observed Apple's attitude towards antitrust compliance during a recent trial found that Apple had unlawfully fixed e-book prices and concluded that Apple as an institution simply "does not want to

engage in retail price competition" – indeed, "one of its principal goals was the elimination of all retail price competition," and "it was happy if a result of that . . . was an increases in prices" that "the consumer had to pay."[1]

11. That district court further stated that "[t]he record at trial demonstrated a blatant and aggressive disregard at Apple for the requirements of the law," (Hr'g Tr. 17:1-2) even among "Apple lawyers and its highest executives," (*id.* at 17:5-6) and concluded that an injunction was needed to ensure that a "comprehensive and effective" (*id.* at 19:18) antitrust compliance training program would be undertaken by "each of Apple's officers and directors engaged in whole or in part in activities relating to the supply of content," including "apps" (*id.* at 13:18-20). "Neither Mr. [Eddy] Cue," the Apple executive responsible for Apple's App Store, nor "his assigned in-house counsel, could remember [having] any training on antitrust issues," and "[t]hey and those on their teams need to understand what the law requires and how to conform their business practices to the law."[2]

12. Apple's unlawful monopolization of the iPhone applications aftermarket from July 2007 through the present is a direct reflection of Apple's goal of "eliminating all retail price competition" and its culture of disdaining antirust compliance in order to increase the prices its customers pay. Through its actions, Apple has unlawfully stifled competition by erecting impenetrable barriers to entry to would-be distributors

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1 Hearing Transcript ("Hr'g Tr.") at 11:4-5, 33:10-13, *U. S. v. Apple Inc.*, No. 12 Civ. 2826 (S.D.N.Y. Aug. 27, 2013).

2 Hr'g Tr. at 18:11-13.

of iPhone apps, reduced consumer choice in what would otherwise be a robust and competitive iPhone software applications marketplace, and artificially increased prices for iPhone software applications to supracompetitive levels.

13. Apple's illegal iPhone apps monopoly should be enjoined and dismantled, and Plaintiffs and the tens of millions of nationwide iPhone consumers they seek to represent should be reimbursed by Apple for the hundreds of millions of dollars they have been overcharged.

B. Summary Of Claims

14. In pursuit and furtherance of its unlawful anticompetitive activities, Apple: (a) failed to obtain iPhone consumers' contractual consent to Apple's monopolization of the iPhone applications aftermarket, the effect of which was to lock consumers into buying apps only from Apple and paying Apple's 30% fee, even if they wished to buy apps elsewhere or pay less; and (b) failed to obtain iPhone consumers' contractual consent to having their iPhones "locked" to prohibit them from using any app that was not approved or sold by Apple, thereby preventing iPhone purchasers from downloading and using other apps, called "Third Party Apps."

15. Apple violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize the software applications aftermarket for iPhones in a manner that harmed competition and injured iPhone apps consumers by reducing output and consumer choice, and by increasing prices for iPhone apps to supracompetitive levels.

16. Plaintiffs seek declaratory and injunctive relief, treble and exemplary damages, costs and attorneys' fees. As for equitable relief, Plaintiffs seek an order restraining Apple from selling iPhones that are programmed in any way to prevent or hinder consumers from downloading Third Party Apps, or minimally, restraining Apple from selling or distributing iPhones without fist obtaining the consumers' express contractual consent to (a) buying apps only from Apple and (b) having their iPhones locked to accept only apps purchased from Apple.

THE PARTIES

17. Plaintiff Stephen H. Schwartz is an individual residing in Ardsley, New York who, in October 2010, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

18. Plaintiff Edward W. Hayter is an individual residing in Brooklyn, New York who, in March 2008, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

19. Plaintiff Eric Terrell is an individual residing in Oakland, California who, on or about June 29, 2007, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

20. Plaintiff Robert Pepper is an individual residing in Chicago, Illinois who, on or about June 29, 2007, purchased an iPhone and paid Apple for iPhone apps during the Class Period.

21. Defendant Apple is a California corporation with its principal place of business located at 1 Infinite Loop, Cupertino, California 95014. Apple regularly conducts and transacts business in this District, as well as throughout Illinois, New York and elsewhere in the

United States. Apple manufactures, markets, and sells the iPhone, among other electronic devices.

JURISDICTION AND VENUE

22. This Court has federal question jurisdiction pursuant to the Sherman Act, the Clayton Antitrust Act of 1914, 15 U.S.C. § 15, and pursuant to 28 U.S.C. §§ 1331 and 1337.

23. This Court also has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because sufficient diversity of citizenship exists between parties in this action, the aggregate amount in controversy exceeds $5,000,000, and there are 100 or more members of the proposed class.

24. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because some Plaintiffs purchased iPhones in this District, Apple has its principal place of business in this District, a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here, and Apple is a corporation subject to personal jurisdiction in this District and, therefore, resides here for venue purposes.

25. Each Plaintiff and member of the Class, in order to activate their iPhone, was required to accept Apple's "iPhone Terms and Conditions" (the "Terms"). The Terms state, in pertinent part, that "You expressly agree that exclusive jurisdiction for any claim or dispute with Apple . . . resides in the courts in the State of California."

FACTUAL ALLEGATIONS

A. Apple's Anticompetitive Conduct

26. In Spring 2007, Apple began a massive advertising campaign to market its new wireless

communication device, the iPhone. The iPhone was advertised as a combined mobile phone, iPod and "breakthrough" Internet communications device with desktop-class email, an "industry first" "visual voicemail," web browsing, maps and searching capability. The iPhone was, in effect, the world's first mobile computer. The iPhone shifted the paradigm for smartphones, and it changed the entire cell phone manufacturing industry.

27. Having designed and manufactured a highly advanced and desirable new product, Apple profited handsomely from selling its revolutionary new handset. The iPhone debuted on June 29, 2007, and despite its hefty $499 or $599 price tag, consumers waited in line to get their hands on one.[3] Apple has rightfully earned billions of dollars in revenue from selling its iPhones.

28. But Apple wanted more. It did not want to limit its revenues to what consumers were willing to pay for the iPhone itself. Apple wanted a substantial piece of every dollar that would ever be paid to buy any kind of software for the iPhone at any time anywhere in the world.

29. To achieve that end, Apple embarked on a scheme to monopolize the aftermarket for iPhone applications and to foreclose and protect Apple against

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[3] Initially, the 4GB iPhone 2G retailed for $499 and the 8GB iPhone 2G retailed for $599. Apple has since released five other iPhone models, the iPhone 3G, iPhone 3GS, iPhone 4, iPhone 4S and iPhone 5, and it is expected shortly to release its new iPhone 5S. Currently, Apple sells 16GB, 32GB and 64GB versions of the iPhone 5, which range in price from $199 to $849, unless they are purchased as part of a handset-subsidized voice and data service plan offered by a cell phone service provider such as Verizon, Sprint, T-Mobile or AT&T Mobility.

any and all competition it might face in the distribution of iPhone applications. In contrast to the robust competition Apple faces in the software aftermarket for its desktop and laptop computers, Apple wanted the entire iPhone software aftermarket for itself. Apple achieved its unlawful goal, through a series of actions.

30. Apple at all times retained exclusive control over the design, features and operating software for the iPhone, known as iOS, which is based on the same technologies that are used in Apple's desktop and laptop computers' operating systems, known as OS X. Although Apple has always maintained OS X as an "open" system that allows iMac and MacBook consumers to run software manufactured or sold by any distributor, Apple modified its iOS version to be a "closed" system by installing "security measures" or "program locks" designed to prevent iPhone consumers from installing and running apps that were not sold or approved by Apple.

31. Apple did not close the iOS system for the purpose of protecting its proprietary right to own, sell or license iOS. Apple closed the iOS system for the specific purpose, and with the specific intent, of foreclosing competition from other potential iPhone software manufacturers and distributors so that Apple could monopolize and derive monopoly profits from the iPhone apps aftermarket.

32. After Apple launched its iPhone 2G in June 2007, Apple enhanced its iPhone-related revenues either by developing its own apps for ringtones, instant messaging, Internet access, gaming, entertainment, video and photography or by enabling "approved" third party manufacturers to develop iPhone apps. Apple always conditioned its "approval" of such apps on the

third party's agreement to give Apple a share of the third party's sales proceeds.

33. However, because Apple's OS X and iOS operating systems were based on the widely available Unix platform and included technologies and services that were based on other open software systems, Apple's initial program locks designed to eliminate Third Party Apps proved ineffective, as clever third party programmers quickly circumvented Apple's security measures and made non-Apple approved iPhone apps available for sale on the Internet.

34. Almost immediately after the iPhone's launch unapproved Third Party Apps started to appear and threatened to compete with Apple in the iPhone apps aftermarket. For example, Mobile Chat and FlickIM gave iPhone users access to instant messaging programs from which Apple derived no revenues. Apple responded to these threats by updating its iOS to eliminate iPhone consumers' ability to use these Third Party Apps and by warning its iPhone customers that using Third Party Apps would nullify Apple's iPhone warranty.

35. Apple also faced threatened competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any portion of that song into a ringtone. A number of competing programmers promptly offered a variety of ringtone programs that enabled iPhone consumers to download both songs and ringtones for free. Some of these programs allowed customers to use samples of popular songs lawfully downloaded from Apple's iTunes store as a ringtone. Other programs, such as I-Toner from Ambrosia Software and iPhone RingToneMaker from

Efiko software, allowed customers to "clip" portions of songs purchased by them from iTunes for use as ringtones.

36. Since many of these programs used songs downloaded from iTunes, Apple initially sought to block the use of those songs as ringtones by updating the iTunes software to install program locks that would interfere with such use. However, those efforts were all quickly defeated by third party programmers, sometimes within hours of the release of the update. So Apple again responded to these threats by updating its iOS to eliminate iPhone consumers' ability to use these Third Party Apps and by voiding the warranties of iPhone customers who used them.

37. Ultimately, Apple eliminated the threat of competition from unapproved apps developers by conceiving and implementing the App Store in order to become the exclusive distributor of iPhone apps, and by thereafter rigorously enforcing and maintaining its monopoly.

38. Apple laid the groundwork for its App Store in March 2008, when Apple released a "software development kit" ("SDK") for the stated purpose of enabling independent software developers to design applications for use on the iPhone. For an annual fee of $99, the SDK allows developers to supply apps to Apple for distribution through Apple's App Store.

39. Apple opened its App Store in July 2008. Apple owns 100% of the App Store, staffs the App Store with Apple employees or agents, and controls all of the App Store sales, revenue collections and other business operations.

40. Apple informs its prospective apps developers (though not its iPhone consumers) that the developers'

apps cannot be sold anywhere except in the App Store. Apple also informs its developers (but not its iPhone customers) that Apple will charge iPhone consumers a 30% commission for any non-free app sold in the App Store.

41. Consequently, the prices for apps available in Apple's App Store include the developers' price plus Apple's 30% mark-up. When an iPhone customer buys an app from Apple, it pays the full purchase price, including Apple's 30% commission, directly to Apple. Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer. Apple sells the apps (or, more recently, licenses for the apps) directly to the customer, collects the entire purchase price, and pays the developers after the sale. The developers at no time directly sell the apps or licenses to iPhone customers or collect payments from the customers.

42. On information and belief, throughout the Class Period, Apple threatened to terminate any developer that made its apps available on its own website or through a distributor other than Apple, and Apple continued to discourage iPhone customers from downloading Third Party Apps by telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded a Third Party App.

43. By designing the iPhone iOS as a closed system, installing security measures and program locks to prevent Third Party App downloads, establishing the App Store as the exclusive worldwide distributor of iPhone apps, and enforcing the App Store's exclusive distributor status by terminating apps developers who sold apps in competition with Apple and voiding the

warranties of iPhone consumers who bought competing apps, Apple has since June 2007 willfully acquired and maintained a monopoly in the iPhone apps aftermarket and has positioned itself as the one and only distributor of iPhone apps on the entire planet. Apple has no competition in the multi-billion dollar iPhone apps aftermarket, domestically or abroad, whatsoever.

44. Prior to Plaintiffs' purchases of their iPhones, Apple had not even disclosed – much less obtained the Plaintiffs' contractual consent to – either (a) Apple's monopolization of and collection of monopoly profits from the iPhone applications aftermarket, or (b) having their iPhones locked to prohibit Plaintiffs from using any app that was not approved or sold by Apple. Absent obtaining Plaintiffs' contractual consent, Apple's monopolization of the iPhone applications aftermarket constitutes an antitrust violation under Section 2 of the Sherman Act.

B. Plaintiffs' Injuries

45. Plaintiffs have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid in a competitive market. Plaintiffs have also been injured because Apple's unlawful monopolization of the iPhone apps aftermarket has extinguished Plaintiffs' freedom of choosing between Apple's App Store and lower cost market alternatives that would have been available had Apple not monopolized the market. Plaintiffs have also been injured because Apple's establishment and maintenance of monopoly pricing has caused a reduction in the output and supply of iPhone apps, which would have been more abundantly available in a competitive market.

46. That Plaintiffs have paid supracompetitive prices is obvious for several reasons. Under basic and fundamental economic principles, the absence of competition leads to increased prices, and increased competition leads to lower prices. In a competitive market, an economically rational manufacturer or distributor will sell its products at prices equal to their cost plus a reasonable marginal rate of return (profit) dictated by the market environment. But an economically rational monopolist that is unconstrained by the downward pricing pressures of a competitive market will charge the highest price it can in light of the demand for its products; the greater the demand, the higher the profits. Indeed, it is hornbook economics that commercial entities strive to acquire and maintain monopoly power precisely because they want to reap the monopoly profits that market domination typically generates.

47. Apple and the iPhone apps aftermarket are not immune from these presumptively valid economic principles. Indeed, as shown above, the generation of monopoly profits was exactly why Apple chose to monopolize the iPhone apps aftermarket.

48. That Apple's 30% fee is a monopoly price is also obvious from Apple's cost structure. Each developer's $99 annual fee covers most or all of Apple's costs of reviewing that developer's apps and the related proportional costs of operating and maintaining the App Store, even if the developer submits several apps annually. As to successive sales of that developer's apps, therefore, Apple's 30% fee constitutes virtually pure profit for Apple. In a competitive environment, where developers could sell their apps on their own websites without charging Apple's 30% mark-up and

discount retailers could obtain volume discounts and sell for far less than a 30% profit, Apple would be under considerable pressure to substantially lower its 30% profit margin because, otherwise, its App Store would be priced out of the market and lose substantial market share. In a truly competitive iPhone apps distribution environment, Apple's 30% margin would be simply unsustainable.

49. A truly competitive iPhone apps distribution market would also give Plaintiffs and other iPhone customers the freedom to choose between Apple's high-priced App Store and less costly alternatives, such as buying direct from apps developers or volume-driven and other software discounters. Plaintiffs' freedom to choose between these market alternatives has been eliminated by Apple's monopolistic conduct, and Plaintiffs have been forced to pay supracompetitive prices to Apple as a result.

50. The lack of a truly competitive environment has also led to reduced output and supply of iPhone apps because developers are barred from selling apps at prices below Apple's inflated 30% marked-up price. Under basic economic principles, lower prices would generate both increased demand and increased supply to meet that demand in the iPhone apps aftermarket as a whole. Apple's unlawful monopoly naturally restricts both supply and demand.

C. Injury To Competition

51. The same conditions – the existence of supracompetitive pricing, reduced consumer choice among market alternatives, and reduced output and supply – demonstrate that Apple's monopolistic

conduct has likewise injured competition generally in the iPhone apps aftermarket.

52. The iPhone apps market is not remotely like the genuinely competitive personal computer software market, where computer hardware manufacturers – including Apple itself – do not control or have a financial stake in every sale of software that is downloaded on the computers they make. In the aftermarkets for desktop and laptop computer software, the software developers can offer products directly to consumers or through discounters without having to gain the computer manufacturer's approval and without the software customers paying the manufacturer a penny. Consequently, there is an abundant supply of competing software applications, and consumers can shop among multiple vendors without paying above market prices.

53. The iPhone apps market lacks all of these indicia of competitiveness. Because Apple has unlawfully cornered the nationwide (and, indeed, worldwide) distribution market for iPhone apps, the iPhone apps aftermarket has been harmed generally by Apple's anticompetitive conduct, which is precisely the type of harm the antitrust laws were enacted to remedy.

CLASS ALLEGATIONS

54. Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated for the purpose of asserting claims alleged in this Complaint on a common basis. Plaintiffs' proposed class (the "Class") is defined under Federal Rules of Civil Procedure 23(b)(2) and (3), and Plaintiffs propose to act as representatives of the following Class comprised of:

All persons in the United States, exclusive of Apple and its employees, agents and affiliates, and the Court and its employees, who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present.

55. The Class for whose benefit this action is brought is so numerous that joinder of all members is impractical.

56. Plaintiffs are unable to state the exact number of Class members without discovery of Apple's records but, on information and belief, state that billions of iPhone apps or licenses for apps were purchased during the Class Period.

57. There are questions of law and fact common to the Class which predominate over any questions affecting only individual members including, among others, (1) whether Apple violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize the aftermarket for iPhone software applications; (2) whether Apple's violation caused harm to the relevant market generally and to Plaintiffs and the Class specifically; and (3) whether Apple should be enjoined from continuing its monopolistic practices and from continuing to monopolize and charge monopoly prices in the iPhone apps aftermarket without first obtaining iPhone consumers' contractual consent.

58. The common questions of law and fact are identical for each and every member of the Class.

59. Plaintiffs are members of the Class they seek to represent, and their claims arise from the same factual and legal bases as those of the Class; they assert the same legal theories as do all Class members.

60. Plaintiffs will thoroughly and adequately protect the interests of the Class, having obtained qualified and competent legal counsel to represent them and those similarly situated.

61. The prosecution of separate actions by individual class members would create a risk of inconsistent adjudications and cause needless expenditure of judicial resources.

62. Plaintiffs are typical of the Class in that their claims, like those of the Class, are based on the same anticompetitive business practices and the same legal theories.

63. Apple has acted on grounds generally applicable to the Class.

64. A class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

RELEVANT MARKET ALLEGATIONS

65. The iPhone is a unique, premium-priced product that generates a unique aftermarket for software applications that can be used only on iPhones. During at least the Class Period, the price of iPhones was not responsive to an increase in iPhone application prices because Apple did not obtain iPhone customers' knowledgeable contractual consent to Apple's monopolization of and monopoly pricing in the apps aftermarket. Consequently, (a) consumers who purchased iPhones could not, at the point of sale, reasonably or accurately inform themselves of the "lifecycle costs" (that is, the combined cost of the handset and its required services, parts and applications over the iPhone's lifetime); and (b) consumers were "locked into" the iPhone due to its

high price tag and would incur significant costs to switch to another handset. The aftermarket for iPhone applications is thus an economically distinct product market, and the applications that are distributed within that market have no acceptable substitutes.

66. The existence of competition in the smartphone market between Apple's iPhone and the makers of competing handsets such as Google's Android phones is irrelevant to the relevant market analysis in a Section 2 Sherman Act aftermarket monopolization case, in which the existence or lack of competition in the aftermarket at issue is the only economically meaningful inquiry. The existence of Android phone applications and applications geared toward other smartphone brands is likewise irrelevant because those applications are technologically incompatible with the iPhone and, therefore, are not reasonably interchangeable substitutes for iPhone apps. Even if those other smartphone apps were technologically compatible, Apple's exclusionary and monopolistic conduct would bar such apps from being sold in competition with Apple for the same reasons and in the same manner that Apple has foreclosed such competition for iPhone Third Party Apps generally.

67. The geographic scope of the iPhone applications aftermarket is national.

68. The aftermarket for iPhone applications includes the market for distributing software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic and video capability, gaming and other entertainment, Internet applications, and any other downloadable software-driven functions.

69. The applications aftermarket came into existence immediately upon the sale of the first iPhones because: (a) the applications aftermarket is derivative of the iPhone; and (b) no Plaintiff or member of the Class agreed to any restrictions on their ability to access a competitive iPhone applications aftermarket.

COUNT I

Unlawful Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

70. Plaintiffs reallege and incorporate paragraphs 1 through 69 above as if set forth fully herein.

71. Apple has acquired monopoly power in the iPhone applications aftermarket through unlawful, willful acquisition and maintenance of that power. Specifically, Apple has unlawfully acquired monopoly power by: (a) designing the iPhone iOS as a closed system and installing security measures and program locks for the specific purpose of preventing Third Party App downloads; (b) establishing the App Store as the exclusive worldwide distributor of iPhone apps; and (c) enforcing the App Store's monopoly status by terminating or threatening to terminate apps developers who sell apps in competition with Apple and by voiding the warranties of iPhone consumers who buy competing apps.

72. Apple's unlawful acquisition of monopoly power has reduced output and competition and resulted in increased, supracompetitive prices for products sold in the iPhone applications aftermarket and, thus, harms competition generally in that market.

73. Plaintiffs have been injured in fact by Apple's unlawful monopolization because they have been: (a) deprived of lower cost alternatives for apps; (b) forced to pay supracompetitive prices for apps; and/or (c) subjected to a lower output and supply of apps.

74. Apple's unlawful monopolization of the iPhone applications aftermarket violates Section 2 of the Sherman Act, and its unlawful monopolization practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's unlawful monopolization, and Apple is therefore liable for treble damages, costs, and attorneys' fees in amounts to be proved at trial.

COUNT II

Attempted Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

75. Plaintiffs reallege and incorporate paragraphs 1 through 74 above as if set forth fully herein.

76. Defendant Apple has engaged in exclusionary, predatory and anticompetitive conduct with a specific intent to monopolize the iPhone applications aftermarket. Specifically, Apple has attempted unlawfully to acquire monopoly power by: (a) designing the iPhone iOS as a closed system and installing security measures and program locks for the specific purpose of preventing Third Party App downloads; (b) establishing the App Store as the exclusive worldwide distributor of iPhone apps; and (c) enforcing the App Store's unlawfully acquired market position by

terminating or threatening to terminate apps developers who sell apps in competition with Apple and by voiding the warranties of iPhone consumers who buy competing apps.

77. Apple's anticompetitive actions have created a dangerous probability that Apple will achieve monopoly power in the applications aftermarket because Apple has already unlawfully achieved an economically significant degree of market power in that market and has effectively foreclosed new and potential entrants from entering the market or gaining their naturally competitive market shares.

78. Apple's attempted acquisition of monopoly power has reduced output and competition and resulted in increased, supracompetitive prices for products sold in the iPhone applications aftermarket and, thus, harms competition generally in that market.

79. Plaintiffs have been injured in fact by Apple's attempted monopolization because they have been: (a) deprived of lower cost alternatives for apps; (b) forced to pay supracompetitive prices for apps; and/or (c) subjected to a lower output and supply of apps.

80. Apple's attempted monopolization of the iPhone applications aftermarket violates Section 2 of the Sherman Act, and its anticompetitive practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's attempted monopolization, and Apple is therefore liable for treble damages, costs, and attorneys' fees in amounts to be proved at trial.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment against Apple as follows:

a. Permanently enjoining Apple from monopolizing or attempting to monopolize the iPhone applications aftermarket or, minimally, restraining Apple from selling or distributing iPhones without first obtaining the consumers' express contractual consent to (a) Apple's monopolization of and charging of monopoly prices in the iPhone apps aftermarket, and (b) having their iPhones locked to accept only apps or purchased from Apple;

b. Awarding Plaintiffs and the Class treble damages for injuries caused by Apple's violations of the federal antitrust laws;

c. Awarding Plaintiffs and the Class reasonable attorneys' fees and costs; and

d. Granting such other and further relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

DATED: September 5, 2013

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